IMPLEMENTATION OF THE SMALL BUSINESS REGULATORY ENFORCEMENT FAIRNESS ACT OF 1996

HEARING

BEFORE THE

COMMITTEE ON SMALL BUSINESS
UNITED STATES SENATE

ONE HUNDRED FOURTH CONGRESS

SECOND SESSION

JULY 24, 1996

Printed for the Committee on Small Business

U.S. GOVERNMENT PRINTING OFFICE

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WEDNESDAY, JULY 24, 1996

UNITED STATES SENATE,
COMMITTEE ON SMALL BUSINESS,
Washington, D.C.

The Committee met, pursuant to notice, at 3:04 p.m., in Room 428A, Russell Senate Office Building, the Honorable Christopher S. Bond (Chairman of the Committee) presiding.

Present: Senator Bond.

OPENING STATEMENT OF THE HONORABLE CHRISTOPHER S. BOND, CHAIRMAN, COMMITTEE ON SMALL BUSINESS, AND A UNITED STATES SENATOR FROM THE STATE OF MISSOURI

Chairman BOND. Good afternoon, and welcome.

First, let me express my apologies, as always, for the schedule of the Senate. We tried to do this yesterday when we were having a "vote-athon," and it is a good thing we did not try. We gave up having it in the afternoon because we did not get through with the afternoon work until about 7 o'clock last night. We were sure when we scheduled this that Agricultural Appropriations, which my distinguished Ranking Member also serves on as Ranking Member, would be off the floor. It is with apologies to Senators Bumpers and his staff that we go ahead, but we are very interested in this subject, and we certainly appreciate everybody adjusting their schedules.

As I trust everybody in this room knows, the Small Business Regulatory Enforcement Fairness Act, or as it is now being referred to as SBREFA, which was signed into law on March 29, 1996, as Title II of the Contract with America Advancement Act, became effective in most provisions on June 28, 1996, and this is the first oversight hearing on the implementation of the new law.

SBREFA authorizes judicial enforcement of the Regulatory Flex Act, ensuring that Federal agencies consider ways to reduce any significant economic impact of new regulations on small business.

It requires Federal agencies to prepare plain English guidelines. It sets up an independent ombudsman, allows small businesses to recover expenses, and authorizes Congress to review and overturn new regulations in certain instances within a 60-day window.

In an effort of evaluate agency implementation of SBREFA, the Committee has sent letters to five of the major regulatory agencies, the IRS, EPA, OSHA, OMB, and SBA, requesting information on

how they will implement SBREFA. We have also sent letters to all agencies affected by the Regulatory Flexibility Act requesting copies of their regulatory review plans.

Frankly, the agencies have taken inconsistent approaches based on the responses we have received, and I hope we can, by having a discussion about it, get a better idea of the direction we all want this process to go in the future.

We are very pleased on the first panel to hear from Ms. Sally Katzen, director of OMB's Office of Information and Regulatory Affairs, and Mr. Jere Glover, who is the chief counsel for Advocacy at SBA. These two individuals play a very central role to the successful implementation of SBREFA and the Regulatory Flexibility Act, since OIRA is responsible for the review of all regulations and the Office of Advocacy serves as a spokesperson for small business.

In April 1994, GAO issued a report on the Status of Agencies' Compliance with Regulatory Flexibility suggesting OMB and SBA establish procedures OMB could use to determine agency compliance, and in response to that recommendation and the work of this Committee under the leadership of Senator Bumpers, QMB and SBA early in 1995 established a framework for monitoring agency compliance with Regulatory Flexibility.

One of the things we would be interested in finding out is how this has worked in the past year and a half and how the lessons learned from that work can be applied in the future.

Our second panel will look at recent regulatory actions and get some perspectives from small business. We will look to see whether plans and policies are being carried out by the regulatory agencies that most affect small business.

I want to assure other agencies that while we may not be able to invite them today, we will be having additional SBREFA oversight hearings in the future, and they will certainly have an opportunity to present their individual stories.

[The prepared statement of Senator Bond follows:]

PREPARED STATEMENT OF SENATOR CHRISTOPHER S. (KIT) BOND, CHAIRMAN
COMMITTEE ON SMALL BUSINESS
JULY 24, 1996

Good afternoon. The Small Business Regulatory Enforcement Fairness Act, or as it is now being referred to as "SBREFA," was signed into law on March 29, 1996, as Title II of the Contract with America Advancement Act.

Most provisions of the Act became effective on June 28, 1996, and today the Small Business Committee is holding its first oversight hearing on the implementation of the new law.

SBREFA authorizes judicial enforcement of the Regulatory Flexibility Act, ensuring the federal agencies consider ways to reduce any significant economic impact of new regulations on small businesses.

In addition, it requires federal agencies to prepare plain English compliance guides spelling out in easy to follow language how small business can comply with federal regulations.

Another key provision sets up an independent ombudsman to receive confidential complaints and comments from small businesses about their dealings with federal regulators. Regional review boards will "rate the regulators" based on these comments and publish their findings in a report card for each agency.

Further, the bill allows small businesses to recover their expenses and legal fees from the government when enforcers make excessive demands for fines or penalties that cannot be sustained in court.

Finally, the bill authorizes Congress to review and overturn new regulations written by federal agencies within a 60-day window. This last provision was not part of the bill as reported by the Committee, and we will not focus on it in this hearing.

In an effort to evaluate agency implementation of SBREFA, the Committee sent letters to five of the major regulatory agencies (IRS, EPA, OSHA, OMB, SBA) requesting information on how they will implement SBREFA.

Additionally, the Committee sent letters to all agencies affected by the Regulatory Flexibility Act requesting copies of their regulatory review plans as required by Section 610 of the Reg Flex Act.

The responses we have received to date suggest a somewhat inconsistent approach to agency implementation of SBREFA and Reg Flex.

On our first panel of witnesses, we will hear from Ms. Sally Katzen, Director of OMB's Office of Information and Regulatory Affairs and Mr. Jere Glover who is the Chief Counsel for Advocacy at the Small Business Administration.

The roles of the OMB and the Chief Counsel are central to the successful implementation of SBREFA and the Reg Flex Act. Under current Executive Orders, OMB's Office of Information and Regulatory Affairs is responsible for the review of all government regulation to insure that agencies comply with a variety of statutory mandates, including Reg Flex.

The Small Business Administration's Office of Advocacy serves as a spokesperson for small business within the executive branch on government regulatory actions that affect small business.

In April 1994, GAO issued a report on the Status of Agencies' compliance with the Reg Flex Act suggesting OMB and SBA establish procedures OMB could use to determine agency compliance with Reg Flex.

Partially in response to the GAO recommendation and the work of this Committee under the leadership of the Senator from Arkansas, OMB and the SBA's Office of Advocacy early in 1995 established a framework for monitoring agency compliance with the Regulatory Flexibility Act.

Today, we will want to find out how this joint effort has worked over the past year and one half and how the provisions of SBREFA are being incorporated into this review process.

Our second panel today will look at several recent regulatory actions to give the Committee a view from the perspective of small businesses of specific examples of how SBREFA is being implemented in the agencies.

We will look to see whether the plans and policies of OMB and SBA are being carried out by the regulatory agencies that most affect small business.

While time and space does not permit us to have all these agencies before us today, I want to assure those agencies that we will be having additional SBREFA oversight hearings in the future and they will have an opportunity to present their individual stories.

Chairman BOND. With that and my thanks, let me now turn to our witnesses from the administration, Ms. Katzen and Mr. Glover. Please go ahead. We will, of course, make your full statements a matter of the record, and that has a lot better chance of being read than apparently heard by my members who are busy with other things at this moment.

Ms. Katzen.

STATEMENT OF SALLY KATZEN, ADMINISTRATOR, OFFICE OF INFORMATION AND REGULATORY AFFAIRS, OFFICE OF MANAGEMENT AND BUDGET, WASHINGTON, D.C.

Ms. KATZEN. Thank you very much, and good afternoon, Mr. Chairman.

You have asked Jere and me to talk about the implementation of the SBREFA, particularly Subtitles A through D.

At the outset, I would like to note that OIRA and SBA have worked together on a number of projects from the inception of this administration. For example, in March 1994, we kicked off the SBA/OIRA Small Business Forum on Regulatory Reform. Then, in January 1995, Jere and I executed an exchange of letters in which we promised to work well and closely with each other to help with our own responsibilities.

We worked closely with SBA in preparing for the June 1995 White House Conference on Small Business, which I think was very successful, and provided a lot of the recommendations that formed the basis for some of the provisions in SBREFA. SBA also worked very closely with us in the Vice President's regulatory reinvention effort, particularly on the cross-cutting sessions that gave rise to several of the Presidential initiatives which are also codified or otherwise enhanced in SBREFA.

With respect to the statute and its objectives, it is truly with great pleasure that I speak about SBREFA, because I believe it is a very good law. The President signed it with praise because it codifies and reinforces many of the initiatives that we have undertaken to improve the regulatory process, particularly for small businesses.

Subtitles A through D, which is the small business portion of it, talks about two aspects of the regulatory process: how rules are developed and written, and how they are implemented or enforced. This law takes a comprehensive view of the regulatory system. It does not focus on how many pages there are in the Federal Register; instead, it addresses what it really means to those who are subject to these regulations.

With regard to how rules are developed and written, SBREFA speaks to such issues as (1) making certain that agencies focus on whether and how their rules affect small entities, (2) having agencies obtain meaningful comments from small regulated entities early in the rulemaking process, and (3) having agencies write their rules in a way that those affected by them understand them and know how to comply.

In particular, SBREFA provides judicial review for the Regulatory Flexibility Act—which the President has long supported—establishes for EPA and OSHA interagency panels to collect the views of affected small business—which flows from the emphasis

on early consultation in our Executive order establishing regulatory review—and it requires agencies to prepare "plain English" small business compliance guides.

All of these reflect the President's continuing concern that agencies focus on results, not red tape, and focus on compliance rather than playing "gotcha" with the regulated entities.

That brings me, then, to the second part of this law, which is how regulations are implemented and enforced.

In your opening statement, you identified a number of the provisions requiring agencies to answer questions, where appropriate, from small businesses or otherwise assist them with small business development centers; having SBA establish ombudsmen and regulatory fairness review boards; requiring agencies to establish waiver policies to provide for the reduction or, in appropriate circumstances, the waiver of civil penalties; and amending the Equal Access to Justice Act. Again, these are not new ideas. They flow from some of the initiatives that have been developed by the administration or were recommended by the White House Conference on Small Business—and are responsive to truly felt needs. So we believe that these are all quite salutatory and are important issues for us to concentrate on.

Subtitles A through D took effect on June 28, 1996, and in advance of this effective date, the agencies had already begun to identify the steps they needed to take to comply.

From our perspective, as I noted in my response to your letter which was dated July 19, the most pertinent provision for OMB is section 244, which establishes small business advocacy review panels for those EPA and OSHA rulemakings that will have a significant impact on a substantial number of small entities. We play a key role with SBA after EPA or OSHA convenes a review panel to receive the views of small businesses and then communicate them to the agency.

OIRA and the Chief Counsel for Advocacy have met a number of times to discuss how we would handle this. The EPA and OSHA have joined us for some of the meetings. Their staffs have been working on the timing and procedures for these panels, as well as trying to identify the rules that would be appropriate for review by these panels. I think things are proceeding—as we would expect—on course.

The remaining provisions in Subtitles A through D do not directly affect OIRA or OMB. Again, as I stated in my letter to you, we are an "agency" for purposes of these Subtitles, but we have not issued in the past, and will not likely issue in the future, any regulations that are the subject of these provisions.

Nor in this statute is there any assignment of responsibility to OMB either of a coordinating or oversight role. Those statutory responsibilities were given directly to the agencies or to SBA.

In my written testimony, I also discuss Subtitle E where we have a slightly larger, but not very significant, role to play. I would be happy to answer questions about any of that material or any of the matters that I have covered here.

[The prepared statement of Ms. Katzen follows:]

EXECUTIVE OFFICE OF THE PRESIDENT
OFFICE OF MANAGEMENT AND BUDGET
WASHINGTON, D.C. 20503

ADMINISTRATOR
OFFICE OF
INFORMATION AND
REGULATORY AFFAIRS

STATEMENT OF SALLY KATZEN
ADMINISTRATOR
OFFICE OF INFORMATION AND REGULATORY AFFAIRS
OFFICE OF MANAGEMENT AND BUDGET
BEFORE THE
COMMITTEE ON SMALL BUSINESS
UNITED STATES SENATE

Good morning, Mr. Chairman and Members of this Committee. I am Sally Katzen, Administrator of the Office of Information and Regulatory Affairs (OIRA) within the Office of Management and Budget (OMB). You invited me here today to speak about the actions that OMB has taken or will take to implement the recently enacted Small Business Regulatory Enforcement Fairness Act (SBREFA), particularly subtitles A, B, C, and D, and have asked that I appear on a panel here with Jere Glover, the Chief Counsel for Advocacy.

At the outset let me say that OIRA and SBA have worked together on a number of projects from the inception of this Administration. For example, on March 17, 1994, we kicked off the SBA/OIRA Small Business Forum on Regulatory Reform. Over the following months, in an unprecedented interagency effort with Labor (OSHA), EPA, the IRS, FDA, DOT, and DOJ, more than 80 agency personnel participated in the Forum workshops, hearing from a large number of small businesses. The Forum produced more than 140 specific recommendations, many of which are now being implemented. In addition, on January 11, 1995, there was an exchange of letters between OIRA and the Office of Advocacy describing our ongoing working relationship. OIRA agreed to share proposed agency rules which we had received for review under E.O. 12866, and, where the Office of Advocacy raised questions, to discuss the results of our reviews to assure better compliance with the Regulatory Flexibility Act. We also worked closely with SBA in preparation for the June 1995 White House Conference on Small Business, which produced a series of recommendations that are reflected in SBREFA. And SBA worked closely with us in connection with the Vice President's regulatory reinvention efforts, particularly on the cross-cutting sessions that gave rise to several of the President's initiatives designed to improve small business participation in the regulatory system.

I am delighted to have the opportunity to speak with you about SBREFA. This new law codifies and otherwise reenforces

many of the President's initiatives to improve the regulatory process. We all recognize that the managerial resources of small businesses are often limited and focused primarily on the needs of the business, not on the legal, administrative, and reporting requirements that come from Federal (or for that matter, State and local) regulations. The cumulative requirements of many different regulatory programs may be difficult to sort out and reconcile with the limited resources available. Federal agencies, in developing and implementing their regulatory programs -- either directly or working through State, local, and tribal governments -- need to be sensitive and, to the extent practicable, responsive to the concerns of small businesses.

SBREFA also strikes a nice balance of responsibilities between the Executive and Legislative branches of government. Although this law is divided into several subchapters, it really contains two portions. One portion (subtitles A through D) originated in this Committee as S. 942, and is directed at the Executive branch.[1] These subtitles took effect on June 28, 1996. The second portion (subtitle E) began as S. 219, under the lead sponsorship of Senators Nickles and Reid, and is directed at the Congress. It took effect on enactment.

I would like to focus on the Small Business portion -- subtitles A through D. These provisions address two key aspects of the regulatory process: (1) how rules are developed and written; and (2) how they are implemented and enforced.

With regard to how rules are developed and written, SBREFA speaks to such issues as (1) making certain that agencies focus on whether and how their rules affect small entities; (2) obtaining meaningful comments from small regulated entities early in the rulemaking process; and (3) having agencies write their rules so that those affected can understand them and know how to comply.

In particular, SBREFA:

(1) provides for judicial review of various provisions of the Regulatory Flexibility Act to enable small entities adversely affected and aggrieved by final agency actions to obtain reasonable relief (subtitle D);

(2) establishes interagency panels to collect the views of affected small businesses and report back to either EPA or OSHA on their concerns (section 244); and

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[1] A subsequent amendment to subtitle D calling for interagency review panels, described below, is based on S. 917, originally introduced by Senator Domenici.

(3) requires agencies to prepare "plain English" small business compliance guides for rules subject to the Regulatory Flexibility Act (section 212).

These are not new ideas. Many, if not all, have roots in the SBA/OIRA Forum; Presidential directives or initiatives; or the White House Conference on Small Business. President Clinton has long supported providing for judicial review of the Regulatory Flexibility Act; that is something that past administrations have assiduously avoided endorsing. The interagency review panels are fully consistent with the emphasis on early consultation found in E.O. 12866, and the compliance guides are based on recommendations from the SBA/OIRA Forum and the White House Conference on Small Business. And all reflect the President's continuing concern that agencies focus on results, not red tape, by having regulators focus on compliance.

Which brings me to the next major aspect addressed by this portion of the law -- how rules are implemented and enforced. We recognize that an agency rulemaking is not just words on a page. It is also how those words can be implemented by the regulated entity and how they are enforced by the regulatory agency. SBREFA speaks to these issues by:

(1) requiring agencies, where appropriate, to answer inquiries from small entities and to assist them in interpreting and complying with statutes and regulations (section 213);

(2) authorizing Small Business Development Centers to provide small businesses with information on how to comply with regulatory requirements (section 214);

(3) having SBA designate a Small Business and Agriculture Regulatory Enforcement Ombudsman who will work with agencies to ensure that small business concerns are heard and addressed with regard to compliance and enforcement-related activities, and Regional Small Business Regulatory Fairness Boards to advise the Ombudsman on matters concerning agency enforcement actions against small businesses (section 222);

(4) requiring agencies to establish waiver programs to provide for the reduction, and in appropriate circumstances for the waiver, of civil penalties for violations of a statutory or regulatory requirement by a small entity (section 223); and

(5) amending the Equal Access to Justice Act to assist small businesses in recovering their attorney's fees if they have been subject to excessive and unsustainable

proposed penalties or other enforcement actions (sections 231 and 232).

Again, these ideas are all based on recommendations of the SBA/OIRA Forum or the White House Conference on Small Business, and they codify or otherwise reenforce Presidential initiatives. For example, in April 1995, President Clinton directed designated agencies, to the extent permitted by law, to "exercise their enforcement discretion to waive the imposition of all or a portion of a penalty when the violation is corrected within a time period appropriate to the violation in question." To qualify for such a waiver, the small business is to have made "a good faith effort to comply with the applicable regulations," and the violation does "not involve criminal wrongdoing or significant threat to health, safety, or the environment."[2] SBREFA gives the agencies one year to complete their work on these waiver programs, and incorporates in the statute the same considerations incorporated in the President's directive.

As noted above, subtitles A through D took effect on June 28, 1996. In advance of this effective date, the agencies had already begun to focus on what steps were needed to come into compliance. From OIRA's perspective, the most pertinent provision is section 244, entitled "Small Business Advocacy Review Panels." Under this provision, proposed regulations for which EPA or OSHA may need to publish an initial regulatory flexibility analysis are to be discussed with representatives of affected small entities designated by the Chief Counsel for Advocacy to obtain their advice and recommendations. OIRA, the Chief Counsel for Advocacy, and either EPA or OSHA are, as "a review panel," to "report [to either EPA or OSHA] on the comments of the small entity representatives and its [the panel's] findings" as to issues the agency's initial regulatory flexibility analysis needs to address.

Since enactment of SBREFA, staff from OIRA, the Small Business Advocate, EPA, and OSHA have met several times to discuss what needs to be done to implement this new review procedure. EPA and OSHA staff have discussed the timing as well as ways in which the agencies will call for the establishment of such a panel. Their staff are also in the process of identifying upcoming proposed rules covered by this provision.

The remaining provisions in subtitles A through D do not directly affect OIRA or OMB. While OMB is an "agency" for the purposes of those subtitles, OMB has not issued in the past -- and will not likely issue in the future -- regulations that would

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[2] See April 21, 1995, Presidential Memorandum to designated agencies, entitled "Regulatory Reform - Waiver of Penalties and Reduction of Reports."

be subject to those provisions. Nor is this a statute for which OMB was assigned a coordinating or oversight role. The statutory responsibilities were given directly to the agencies or to SBA.

The Committee's letter of invitation did not request a detailed discussion of the implementation of subtitle E -- the Congressional review provisions. Briefly, this subtitle is primarily concerned with the Legislative branch, although it imposes some obligations and responsibilities on those in the Executive branch. OMB was not assigned responsibility for coordination or agency oversight. However, it is my understanding that -- after a short period of transition -- agencies began sending their final regulatory actions to Congress and GAO, and I am told that GAO (and presumably Congress) have already received over 1,300 final rules of which 15 were major final rules.

The provision in subtitle E that directly affects OIRA is 5 U.S.C. 804(2), which calls upon the OIRA Administrator to identify which final agency rules are to be considered "major." In a memorandum to the heads of the executive departments, agencies, and independent establishments, dated April 2, 1996, I noted that: "This definition of 'major' is similar but not identical to the definition of economically 'significant' under section 3(f)(1) of E.O. 12866. If there are questions concerning whether a rule is 'major,' please contact the Office of Information and Regulatory Affairs as soon as possible during the rulemaking." Since then, OIRA staff have worked with their agency counterparts -- both in the executive departments and agencies, and in the independent agencies -- to assure the proper designation of major and non-major. I am not aware of any problems that have arisen with respect to this issue.

I appreciate the opportunity to testify, and would be delighted to answer any questions that you may have.

Chairman BOND. Thank you, Ms. Katzen.
Mr. Glover.

STATEMENT OF THE HONORABLE JERE W. GLOVER, CHIEF COUNSEL FOR ADVOCACY, U.S. SMALL BUSINESS ADMINISTRATION, WASHINGTON, D.C.

Mr. GLOVER. Good afternoon, Mr. Chairman.
Chairman BOND. Good afternoon.
Mr. GLOVER. I had the privilege of working on the original Regulatory Flexibility Act when it was originally being proposed. It was unfortunate, when we were all together with the small business community at the very end of the process, we were given the choice as Congress was winding down of passing the Regulatory Flexibility Act without judicial review or not passing it at all.

We labored over that decision and chose to recommend that it go ahead and be passed without judicial review. There, of course, were some checks in the legislation to make sure that the agencies took it more seriously, one of which was an annual report to Congress by the Office of Advocacy and the other was the authority for the Office of Advocacy to file amicus briefs.

In conversations with previous chief counsel, I jokingly say that the Office of Advocacy is the Rodney Dangerfield of the Government, getting "no respect" in terms of the Regulatory Flexibility Act.

Agencies had a spotty history as to whether they were going to comply with the Regulatory Flexibility Act. Now SBREFA has changed our image to that of "Rocky." We have now gone forward with reinvigorated enthusiasm to encourage agencies to work toward ensuring there is no judicial review and that they have fully complied with the Act. Of course, we will see how that ends up.

I want specifically to thank you, Mr. Chairman, and this Committee for its leadership in passing this important legislation. I have said publicly this is the most important legislation in 20 years for small business, and I believe that will prove to be the case. I believe it will, in fact, change the way Government governs small business, and I think that is very important.

With that general background, let me talk with you a little bit about the outreach that we have undertaken to try to make sure, first, that trade associations representing small businesses are aware of the new legislation and its impact on small business.

We have prepared a guide for trade associations and small businesses explaining the Act in, more or less, lay terms.

We have had a meeting of association executives to which we invited 150 associations. We had about 50 at that session. We have had three other sessions with industry-specific small business trade associations.

In addition, we have had a number of agency "outreach" sessions. We did two originally. We sent notices to all regulatory agencies inviting them to a briefing to discuss the new legislation. We planned on holding two. We had to add a third one because of agency interest. We had over 200 agency officials come to the briefings. In addition, we have held agency-specific meetings involving another couple hundred where we have gone to the agencies like OSHA, FCC,

and EPA, to work with them and their staff. The objective of this activity is obviously to get the word out.

In our three main briefings, representatives of 14 different executive branch agencies and 14 independent agencies were present.

We learned several things about what to expect from the process in the discussions of the new law with the agencies. One is that size standards are going to become an increasingly important issue. The law provides that the Office of Advocacy will advise and work with the agencies on the regulatory analysis; but deviations from the size standards, under the Small Business Act, required the approval of the SBA administrator. We are coordinating our efforts internally within the SBA.

We have also recognized that data on industry characteristics and the type of industry are becoming increasingly important not only to the agencies, but also to small business, so that they can better understand industry characteristics and what the impacts of regulations are going to be on small businesses within an industry.

Answers to these economic concerns will be provided by the Office of Advocacy, which collects each year, from the Bureau of Census and other agencies, tabulations on over 1,500 industries, broken down by establishment, employees, revenues, and payroll. Advocacy is the sole custodian of this information.

We have scheduled another briefing session with policy analysts and economists from the agencies just to brief them on how better to use the economic data available to analyze the impacts of proposed rules and regulations on small business.

We fully expect the agencies and the small business community to make better use of this information in preparing comments on the policy issues.

The third lesson that we learned is that there are a number of issues that cannot be clearly and neatly defined. We have prepared a 31-paged compliance guide for agency officials, which we have distributed in draft form to the agencies and to the Committee. We have asked people to provide us with comments so that we can finalize that guide and provide additional information.

One of the major issues that is unresolved is the definition of "significant impact on a substantial number of small businesses." We are urging the agencies to err on the side of small business. But, as you know, the law does not define that precisely. I think we will see some clarity developing as we go along.

We welcome SBREFA. We foresee good things happening for small business, and we expect more involvement of the Office of Advocacy in early rule development, in the pre-proposal stage, not only with OSHA and EPA, where the law provides that we have panel involvement. But we see, from conversations with the agencies, that they want us to get involved early on and do outreach before they get to the proposed rule stage. I think the idea of the panel should be duplicated by the other agencies. I think we are going to see, certainly, the more enlightened agencies reaching out to the small business community very early in the process.

Thank you very much for the opportunity to appear.

[The prepared statement and attachments of Mr. Glover follow:]

TESTIMONY

OF

JERE W. GLOVER
Chief Counsel for Advocacy
U. S. Small Business Administration

Good morning Mr. Chairman and members of the Committee. I am Jere W. Glover, Chief Counsel for Advocacy, U. S. Small Business Administration. I am pleased to appear before the Committee to discuss what the Office of Advocacy is doing to implement provisions of the Small Business Regulatory Enforcement Fairness Act of 1996 (SBREFA). My comments this morning are my own and may or may not reflect those of the Administration.

The letter of invitation to this hearing asked me to comment on Subtitles, A, B, C and D of the Act, particularly Subtitle D, which amended the Regulatory Flexibility Act. Since the Small Business Administration has obligations under subtitleS A, B and C, I have attached to my testimony a copy of Administrator Lader's response to Senator Bond, Chairman of this Committee, as to actions taken by the SBA to comply with these Subtitles.

Judicial Review

Small business has long sought judicial review. This was a major recommendation of the 1995 White House Conference on Small Business and Congress is to be commended for acting so swiftly to provided this most important avenue of redress for small business. This Committee and Chairman Bond played a pivotal role in successful passage of this legislative reform. Small Business is extremely gratified. In my opinion, the legislation is the most significant legislation to help small business in 20 years. It will make a significant difference in how government governs small business.

As you know, this amendment to the Regulatory Flexibility Act allows a small entity to appeal from an agency's final action

and have the courts review an agency's:

* definition of small entity or small business;
* final regulatory flexibility analysis;
* certification that a rule will not have a significant economic impact on a substantial number of small entities;
* small business outreach;
* delay in completing a final regulatory flexibility analysis; and
* periodic review of rules.

Agency Briefings

It is very clear that agencies are now paying greater attention to the Regulatory Flexibility Act. In the past month, the Office of Advocacy has conducted three briefings to advise agencies how to comply with the Act. (Committee staff were invited to attend.) Over 200 agency personnel representing 14 executive branch agencies, 14 independent agencies and the Office of Management and Budget attended the sessions. Another session is scheduled for July 31 for agency economists and policy analysts. We distributed a draft guide at these briefings asking for agency input, reaction, requests for clarification, etc. Copies of this guide were provided to the Committee's staff prior to this hearing. Once we review the comments and complete a final edit, the guide will be printed and re-distributed to those who attended the briefing. The guide will also be made available to agencies when we find analyses and compliance to be deficient.

In addition, we are currently reviewing questions raised at

the briefings to see if a Q and A handout should be developed and/or incorporate the information into the Guide itself.

We have also held briefings with individual agencies to review their regulatory agendas and to explain their RFA obligations. Attendance at these agency specific briefings was in the neighborhood of 250-300.

The heightened level of agency interest in the Regulatory Flexibility Act is clearly due to the possibility of having certifications and regulatory flexibility analyses reviewed and rules set aside when agencies have not fully complied with the law.

Some agencies know they have been delinquent in the past.

In our annual reports to Congress, we have reported on the number and kind of letters we submitted to agencies commenting on their regulations and compliance with the Regulatory Flexibility Act. We also reported on the level of agency compliance. Some agencies have been very good. Others have a mixed record such as the Department of Agriculture where some branches are very good, but others recalcitrant.

As the chart I have brought with me shows, we have been commenting on more regulations with a decreasing number of staff. As an aside, the unusually large number of letters written by Advocacy in 1992 is an anomaly since most of those letters were form letters that did not include comments on the substance of the regulations. Advocacy has used its comment letters to educate agencies on the provisions of the Regulatory Flexibility Act, to show them how to comply and to comment on the substantive

impact of the rule on small business. We have done this, for example, by raising questions agencies needed to ask and answer in their analyses which they had failed to do.

The legal and regulatory staff is organized around issues. A list of the individuals, the issues they cover and the agencies involved is attached for your use and information.

We also work closely with the Office of Information and Regulatory Affairs (OIRA). Pursuant to the "Exchange of Letters" between OIRA and Advocacy, we have been submitting copies of our letters to that office and OIRA in return has been asking for our input when agencies submit final rules for OIRA clearance to see if more needs to be done before a rule is cleared for final publication.

Trade Association Outreach

Within two months of the President signing the 1996 Act, Advocacy printed a publication highlighting the provisions of the new law and distributed it to small business trade associations. (Copies of this document were also given to committee staff prior to this hearing.) Trade associations are giving the new law great visibility. We anticipate conducting another briefing for the associations once we finalize the Compliance Guide referred to earlier in my testimony.

Other Outreach

Provisions of the new law were summarized in the April issues of Advocacy's SMALL BUSINESS ADVOCATE that is sent to a mailing list of approximately 8,000 small businesspeople, elected officials, libraries, media, etc. And I wrote an article

for the May issue of the ST. LOUIS SMALL BUSINESS MONTHLY. (Copies of both are attached.)

In toto we have reached approximately 500 federal agency personnel, 100 trade association representatives and numerous others through the referenced publications.

Lessons Learned

Advocacy has learned several things as the result of the agency briefings.

1. Size standard definitions have become increasingly important.
2. Data on the industry characteristics have taken on new significance not just for Advocacy and its statutory obligation to publish annually the State of Small Business but for
    * agencies attempting to identify different segments of an industry for analytical purposes, and, also,
    * for trade associations and small businesses as they try to evaluate agency definitions and regulatory alternatives.
3. Some issues cannot be neatly defined; some will have to be decided on a case-by-case basis and others left to the courts.

Size Standards

Small business definitions are now reviewable by the courts. This places greater burdens on SBA's Office of Size Standards and the Office of Advocacy to provide guidance to agencies to help

them segment the industries they are regulating. Advocacy has worked out a procedure with SBA's Office of Size Standards to ensure consistent guidance to agencies. In addition, we have discussed this issue at length in our briefings, explaining what agencies need to do to comply with the Small Business Act as well as the Regulatory Flexibility Act.

Data on Industry Characteristics

If agencies are to assess the impact of their regulations on small business, they need to know the characteristics of the industry they are regulating.

- What is a small business in the context of a particular industry?
- How should it be defined under the regulation?
- How much of the problem addressed by the regulatory proposal is caused by the small businesses in the industry?
- What conduct causes the problem?
- What is the appropriate "regulatory fix" and what will it cost?
- Will the proposal hurt small businesses; if so, is this the pre-ordained result or are there alternatives that achieve the same objectives?
- If small business were exempt from the rule, would the objective still be accomplished?

Answers to all these questions require economic data, much of which can be provided by the Office of Advocacy. Each year, the Office purchases from the Bureau of the Census tabulations on

small business by firm size. This data covers 1500 industries and is broken down by establishments, employment, revenues, payroll, etc. It is also broken down by state and forms the basis of our state profile publications furnished to Members of Congress. Advocacy is the sole custodian of this Census information and the data is the foundation for all our economic reports. The data also supports our comments on rules. We rely on additional economic research to supply the detailed scientific, technical and economic information necessary to fulfill our responsibilities under RFA, especially in light of the 1996 amendments.

We fully expect agencies to look to the Office of Advocacy for information on small businesses by industry. It is for this reason that we are holding a fourth briefing session for economic and policy analysts from the agencies to discuss the kind of data the Office can provide.

Unresolved Issues

The major issue that cannot be neatly defined is: what is a significant impact on a substantial number of small businesses? Industry data will be helpful on a case-by-case basis and the answer will turn on several factors: how small business is defined; how many small businesses there are and their market share; cost structure; how many employees; level of product output, etc. and the impact of the rule on such factors, namely how the factors will change and if the rule will erect unreasonable economic barriers. It is a judgment call in the context of a particular rule. We are urging the agencies to err

on the side of small business. Ultimately, it will be a question for the courts.

Small Business Advocacy Review Panels

This brings me to the Small Business Advocacy Review Panels, in which Advocacy plays a major role in the pre-proposal stage of OSHA and EPA regulations.

Small Business Representatives.

As you know, Advocacy is to provide OSHA and EPA with information on individual representatives of the small entities to be affected by a rule. We are in the process of developing a data base of active small business trade associations and individuals. We have acquired names/lists from EPA and OSHA. In addition, each of our staff members has developed over time a list of individuals whom they consult on an ongoing basis to assess the impact of regulations on small business. All of these names will be included in the data base.

In addition, we have a nationwide network with which the Office is working on public policy issues. The network was developed after the 1995 White House Conference on Small Business and consists of over 100 individual delegates who are working on specific public policy issues. We also asked all 2000 delegates to indicate the issues on which they would be willing to work or testify. A directory of these individuals and their areas of interest was provided to every member of Congress. We are currently in the process of up-dating and refining the listing.

We are reaching out even further to broaden our contact base by writing to trade associations to get more up-to-date

information on their members who can and are willing to be spokespersons for small businesses in their industry. We would welcome any additional names from members of this Committee.

Advocacy Review Panels

We have met on several occasions with representatives of OSHA, EPA and OIRA to discuss the panel process and how the agencies will involve small business representatives in the pre-proposal stage of regulatory development. We are in general agreement that the major thrust of this provision in the law is outreach to the small business community and the latter's meaningful involvement in the process. We are all committed to making sure that this happens and that the recommendations and issues are thoughtfully considered by the respective agencies.

CONCLUSION

The Office of Advocacy welcomes SBREFA. We foresee good things happening for small business. We expect more early involvement of the Office of Advocacy in rule development; greater demands for economic data; and, hopefully, a greater awareness on the part of government agencies of the primary purpose of the Regulatory Flexibility Act, namely, to regulate without hurting competition.

U.S. SMALL BUSINESS ADMINISTRATION
WASHINGTON, D.C. 20416

OFFICE OF THE ADMINISTRATOR

JUL 15 1996

Honorable Christopher S. Bond
Chairman
Committee on Small Business
United States Senate
Washington, D.C. 20510

Dear Mr. Chairman:

This letter responds to your request for information concerning the U.S. Small Business Administration's (SBA) plan to implement procedures and practices with respect to the Small Business Regulatory Enforcement and Fairness Act of 1996 (SBREFA).

Subtitle A -- Regulatory Compliance Simplification

1. Compliance Guides.

The SBA issues numerous publications designed to assist small businesses generally and to inform them about SBA's programs. Many of these guides help business owners and operators to comply with SBA regulations, regardless of whether those regulations have an economic impact under the Regulatory Flexibility Act (RFA).

The SBA strives to write these guides, and our regulations, in language that will be easily understood by our small business customers. Indeed, SBA recently revised all of its existing regulations to appear in a plain English, question and answer format. Since those revisions became effective, SBA has issued several new publications that provide additional information to the small business community, including a comprehensive "SBA Borrowers Guide" we distributed late last month.

Since Section 212 of SBREFA became effective on June 28, 1996, SBA has not issued any final rules that have a significant economic impact under the RFA. With regard to any such rules SBA promulgates, we will continue our practice of supplying small business persons with easily understandable written guidance to assist them in complying with our regulations and taking full advantage of our programs.

Honorable Christopher S. Bond

2. Informal Small Entity Guidance.

One of SBA's principal goals is to provide information and guidance to small businesses on a broad range of subjects and in a wide variety of ways. The SBA currently responds to small business persons' questions and concerns through our network of field offices, Small Business Development Centers, Business Information Centers, the SBA "Answer Desk" and SBA Online, our Internet home page. Though SBA is not a regulatory agency, we are considering ways in which we may build upon our current processes to establish a program under Section 213 of the Act no later than March 29, 1997.

3. Small Business Development Centers.

Last month, SBA's Office of Small Business Development Centers (SBDC) sent a letter to each SBDC informing them of SBREFA's enactment. The letter explained that, as a result of the new law, statutory requirements now provide that SBDCs must do the following: (1) offer information to small business concerns regarding compliance with regulatory requirements; (2) develop informational publications, establishing resource centers of reference materials; and (3) distribute compliance guides published under Section 312(a) of SBREFA.

Subtitle B -- Regulatory Enforcement Reforms

1. Small Business and Regulatory Enforcement Ombudsman.

The SBA is currently evaluating its existing budget and personnel to determine whom to designate as the Ombudsman prior to September 25, 1996. We are reviewing ways in which to ensure that the Ombudsman works constructively with other agencies, the regulatory fairness boards and the small business community. In this regard, we have had several internal Agency meetings, and representatives of the Office of General Counsel have begun meetings with enforcement officials from other agencies to discuss the need for cooperation with the Ombudsman.

2. Regional Small Business Regulatory Fairness Boards.

The SBA is currently consulting with you and your staff, Senator Bumpers, Chairman Meyers and Representative LaFalce regarding the membership of the Boards. The SBA has publicized the creation of the Boards, and we have received numerous recommendations for appointments. Once we appoint the members, SBA

will ensure that they are fully briefed on the powers and responsibilities of the Boards and that the Ombudsman is prepared to coordinate their activities. We fully expect that the process of appointing ten boards will be completed by September 25, 1996.

3. Rights of Small Entities in Enforcement Actions.

Though SBA does not conduct enforcement actions, it has worked closely with other agencies -- including EPA and OSHA -- to create a new regulatory enforcement environment for small businesses. The SBA-sponsored Small Business Forum on Regulatory Reform recommended measures to encourage voluntary compliance with regulations and develop more flexible enforcement mechanisms. As a result, last year President Clinton directed agencies to use their enforcement discretion to waive up to 100 percent of a penalty for a first violation if the business has acted in good faith and the violation is corrected within an appropriate period of time. If a business does not qualify for the waiver, Federal agencies may allow the business to use up to 100 percent of the financial penalty to cure the violation.

The SBA is pleased that this section of SBREFA builds upon the Administration's efforts in this important area of regulatory enforcement. We intend to work closely with other agencies as they implement this provision and create programs to waive and reduce penalties in appropriate circumstances.

Subtitle D -- Regulatory Flexibility Act Amendments

1. Small Business Advocacy Review Panels.

The SBA's Office of Advocacy has met on two occasions with the Office of Information and Regulatory Affairs (OIRA), the Environmental Protection Agency (EPA) and the Occupational Safety and Health Administration (OSHA) to discuss how to proceed with the panels. General agreement exists that the process should build on the existing regulatory system. In addition, provisions will be made for very early consultation and notification of potential rule development. The EPA and OSHA will consult with Advocacy to identify small business representatives who are to be consulted by the agencies and the panels in the pre-proposal stage. The Office of Advocacy is notifying small businesses and other interested entities about the opportunity for participation in this process.

Honorable Christopher S. Bond

2. Other Outreach.

The Office of Advocacy has done outreach to both the small business community and Federal agencies on SBREFA. In April, a briefing was hosted by Advocacy along with several national trade associations on the amended RFA. In May, Advocacy finalized for immediate distribution to the public "A Guide to the Regulatory Flexibility Act" especially developed for the small business community which highlights the 1996 amendments.

In addition, Advocacy has drafted guidance for Federal agencies on the Regulatory Flexibility Act as amended by SBREFA. This guide was distributed at two briefings on the new law for regulatory agencies to which House and Senate leadership of the small business committees were invited. Another briefing for regulatory agencies has been scheduled for July 17.

Agencies were asked to comment on the new guide by July 26, after which date the guide will be finalized for wide distribution to the agencies' staffs.

Thank you for allowing us the opportunity to provide you with information on SBA's plans for implementing SBREFA.

Sincerely,

Philip Lader
Administrator

THE SMALL BUSINESS

United States
Small Business
Administration

Office of Advocacy

ADVOCATE

April 1996

Vol. 15, No. 3

In This Issue

Congress

Passage of Regulatory Enforcement Act a Major Success for 1995 WHCSB

On March 29, President Clinton signed into law the Small Business Regulatory Enforcement Fairness Act of 1996 (P.L. 104-121), which included several regulatory reform provisions that have long been sought by the small business community. Of particular note to the small business community are amendments to the Regulatory Flexibility Act, particularly provisions for judicial review of federal regulations. Credited with advancing the judicial review amendment is Rep. Tom Ewing (R-Ill.), who first introduced the proposal in 1991. Reps. Jan Meyers (R-Kans.), Ike Skelton (D-Mo.), and John LaFalce (D-N.Y.) were instrumental in the House bill's passage, and Sen. Pete Domenici (R-N.M.) worked tirelessly to move the legislation through the Congress. Sen. Christopher Bond (R-Mo.) was the architect of S. 942, the Senate version of the bill, and was the primary mover of the bipartisan proposal that passed the Senate on March 19 by a vote of 100–0.

As the new law specifically states, the provisions are directly

Continued on page 3

New Telecommunications Law Is Good News for Small Firms

On Feb. 8, 1996, President Clinton signed into law the Telecommunications Act of 1996 (P.L. 104-104)—one of the most far-reaching revisions of communications law since the original Communications Act was passed in 1934.

Hailed by proponents as "the biggest jobs bill of the decade," the new law sweeps away barriers to competition in the local telephone exchange market, the long distance market, the cable television market, and the broadcasting industry. Chief Counsel for Advocacy Jere W. Glover stated, "This is one of the single most important legislative changes for small businesses in years."

One key provision of the new law (Section 707) creates a Telecommunications Development Fund to finance small business ventures in the telecommunications industry. The fund will be supplied primarily by monies from interest earned by deposits in the Federal Communications Commission's (FCC) auction escrow accounts. The purpose of the fund is to promote access to capital, increase employment and promote delivery of services to underserved rural and urban areas. The Small Business Administration will have a representative on the fund's board of directors and will take part in all activities of the fund.

The law will: (1) eliminate market barriers that exclude small businesses from the telecommunica-

Continued on page 4

The Small Business Advocate

Editor Sarah Fleming
Assistant Editor Kathryn Tobias
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Susan Walthall

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Regulatory Reform,

from page 1

responsive to recommendations of the June 1995 White House Conference on Small Business (WHCSB). All of the provisions were endorsed and supported by all the major small business groups.

According to the SBA's Chief Counsel for Advocacy Jere W. Glover, "This legislation is among the most important passed since the Regulatory Flexibility Act was signed in 1980. The legislation implements major elements of the 1995 White House Conference on Small Business recommendations. This single bill likely will become the most important legacy of the conference."

The 1980 legislation (codified at 5 USC 601–12) instructed federal agencies to analyze the impact of their regulations on small businesses. But until now, the regulatory analyses issued by the agencies were not subject to review by federal courts; small firms were unable to challenge agencies regarding their compliance with the RFA.

Chief Counsel Glover has been a staunch believer in judicial review as a means to strengthen the Regulatory Flexibility Act. The new law also amends the Equal Access to Justice Act to make it easier for small businesses to be compensated for attorney fees incurred when they must litigate to challenge government enforcement actions.

The new law also mandates that small business input be solicited early in the rulemaking process for proposals issued by the Environmental Protection Agency and the Occupational Health and Safety Administration.

Regulatory agencies must develop compliance guides in plain language for all significant small business rules and the administrator of the U.S. Small Business Administration will appoint a Small Business and Agriculture Enforcement Ombudsman and 10 regional regulatory fairness boards to work with the agencies to monitor enforcement. The law also requires small business penalty policies to be developed by all federal agencies.

"The small business community has waited since 1980 to put teeth in the Regulatory Flexibility Act. With the new amendments in place, recalcitrant agencies will no longer be able to treat lightly their obligations under the act," added Chief Counsel Glover.

Additionally, Title IV of the Small Business Regulatory Fairness Enforcement Act requires that all major final regulations be subject to a 60-day congressional review before going into effect.

The Legislation at a Glance

Some changes that were enacted in the Small Business Regulatory Enforcement Fairness Act of 1996 (P.L. 104-121)

- Provides for judicial review of federal agency small business regulatory analyses.
- Requires that small business input be solicited early in the rulemaking process.
- Directs regulatory agencies to develop compliance guides in plain language.
- Mandates the creation of 10 regional Regulatory Fairness Boards and the position of "Small Business and Agriculture Enforcement Ombudsman" within the Small Business Administration.
- Makes it easier for small business to recover attorney fees in litigation with the federal government.

MAY 1996
Vol. 9 Issue IV

St. Louis Small Business Monthly

Largest Edition EVER!

L by Judy Meador

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Commentary

The Small Business Regulatory Enforcement Fairness Act of 1996

by Jere Glover

On March 29, President Clinton signed into law the Small Business Regulatory Enforcement Fairness Act of 1996 (SBREFA), which includes several regulatory reform provisions that have long been sought by the small-business community. Of particular note are amendments to the Regulatory Flexibility Act, especially provisions for judicial review of federal regulations.

Sen. Kit Bond (R-Mo.) was a staunch supporter of the recommendation of the June 1995 White House Conference on Small Business (WHCSB) concerning judicial review. He was also the architect of S. 942, the Senate version of SBREFA. Sen. Bond crafted and was the primary mover of the bipartisan proposal that passed the Senate on March 19 by a vote of 100-0. Sen. Pete Domenici (R-N.M.) worked tirelessly to move the legislation through the Senate.

Credited with advancing the judicial review amendment in the House of Representatives is Rep. Tom Ewing (R-Ill.), who first introduced the proposal in 1991. Reps. Jan Meyers (R-Kan.), Ike Skelton (D-Mo.) and John LaFalce (D-N.Y.) were instrumental in the House bill's passage.

As the law specifically states, the provisions are directly responsive to WHCSB recommendations. All the provisions were endorsed and supported by all major small-business groups.

In my opinion this legislation is among the most important passed since the Regulatory Flexibility Act (RFA) was signed in 1980. The legislation implements major elements of the 1995 White House Conference on Small Business recommendations. This single bill likely will become the most important legacy of the Conference.

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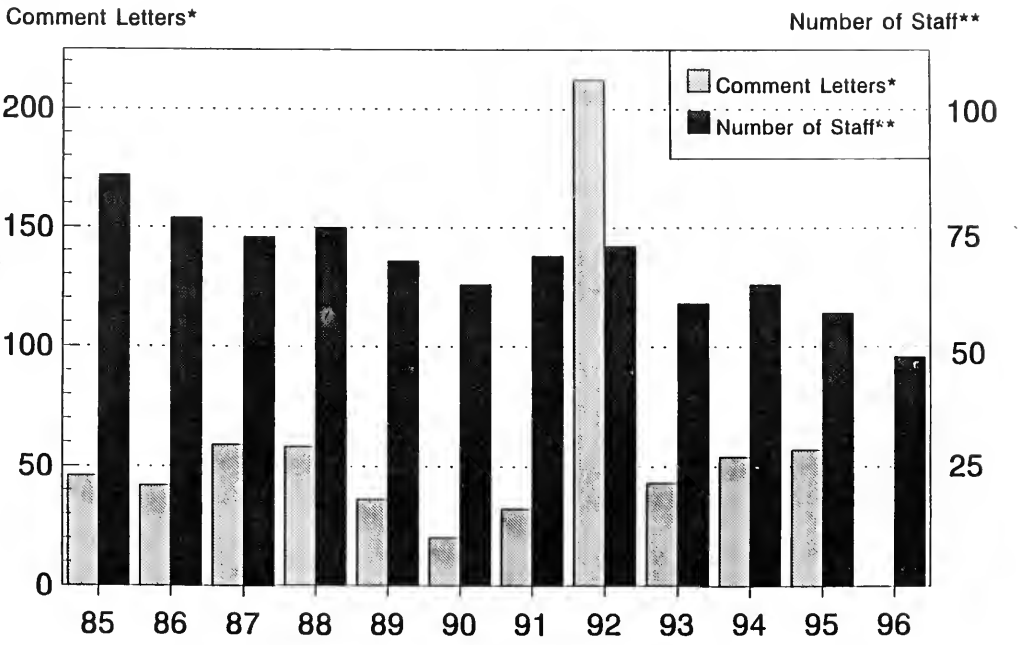
Jere Glover is the chief counsel for cacy of the U. S. Small Business A istration.

Regulatory Flexibility Act Comment Letters

Office of Advocacy, U.S. Small Business Administration



*Comment letter totals are recorded on a calendar year basis.
**Staff totals are recorded on a fiscal year basis.

U.S. SMALL BUSINESS ADMINISTRATION
WASHINGTON, D.C. 20416

OFFICE OF CHIEF COUNSEL FOR ADVOCACY

Office of Advocacy
U.S. Small Business Administration

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(202) 205-6532

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Disabilities		DOJ
Standards		DOL
Minimum Wage & Overtime		DOL
Benefits		DOL
Union Issues		NLRB DOL
Workers Compensation (See also Industrial & Worker Safety)		DOL States
Immigration (workplace issues)		DOJ
Paperwork Reduction	Ray Marchakitus 202/205-6936	
		All Agencies
		OMB
Recordkeeping		"
Reporting Requirements		"
Paperwork Reduction Act Compliance		"
Patents	Terry Bibbens 202/205-6983	
Intellectual Property		Commerce Patent Office USTR
	Back-up:	
	David Zesiger 202/205-6950	
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SBIR	Back-up:	NSF
	Terry Bibbens 202/205-6983	
Product Safety	Shawne Carter 202/205-6945	
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		OMB Exec. Orders
Size Standards	Ray Marchakitus 202/205-6936	
		All Agencies SBA

Tax	Russ Orban 202/205-6946	
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Estate Taxes		"
Expensing		"
Home Office Deduction		"
Paperwork Reduction (STAWRS)		"
Pensions-Deductions		"
Other		"
Telecommunications	David Zesiger 202/205-6950	
Telecommunications Act of 1996		FCC
Universal Service Telecommunication Development Fund		
Communications Issues		"
cellular		"
portability of numbers		"
personal communications systems (PCS)		"
Tort Reform	Shawne Carter 202/205-6950	

Chairman BOND. Thank you very much, Mr. Glover. Thanks to both of you. I appreciate your comments on the significance of this legislation to small businesses.

It was a great pleasure to see that we had not only the strong support of all members of this Committee, but of all 100 members of the Senate.

When we finished the process of passing SBREFA, there were some who asked why we did not let them know because they had a few more amendments they wanted to stick on it, but we had a close working relationship with many different agencies, as well as the members of the Senate. We certainly hope that this law will bring about a change. I think there was a clear message that there needs to be a change in the mentality that small business should be treated as a partner in helping to carry out the goals of the legislation.

Ms. Katzen, I know you said that there is not a specific oversight role for OIRA in the Regulatory Flex Act. As we look at Executive order 12866, however, OIRA is supposed to provide meaningful guidance and oversight to agencies to ensure the regulations comply with that Executive order and with applicable law including regulatory flex.

What are you doing to carry out that 12866 responsibility, and do you need more authority? Is this something where you see there is a shortcoming in the statute? Somebody has to do this. Should you have a greater statutory role?

Ms. KATZEN. Under the Executive order, our approach has been to work with the agencies rather than simply telling them what to do. That might be useful in the short term, but would not change, long term, their approaches to developing regulations. So we work in a more collegial way.

One of the things that we do, for example, is that we only look at the most or what we call "significant" and "economically significant" regulations. There will be maybe anything from 4 to 6,000 regs that are issued a year, most of which are either noncontroversial, routine, administrative, or ministerial. We do not review all of those. Last year, I think we only reviewed a few more than 600 proposed and final rules.

With respect to the rules we reviewed, we are focusing on a variety of issues such as whether there is analysis, whether there is policy consistency, whether there is the requisite outreach and input and responsiveness to the regulated entities—both those that would benefit from and those who would be burdened by the regulation. In the same vein, we will look to see that the agencies have done the work that they should be doing under the Regulatory Flexibility Act.

Part of the exchange of letters that I had with Jere is that when we see a regulation that raises a reg flex question—since I believe that SBA is and should remain the lead agency in this regard—we will refer the rulemaking document to his office to ask what they think about this. We also encourage his office to comment not only on the rules that we refer to him, but on any others that may come to his attention.

So that, in an ad hoc, informal, but nonetheless, I think, serious way, we do look at the more significant rules. This means that the

agencies have responsibility with respect to the rest of them. We have a regulatory working group of the senior regulatory policy offices from each of the agencies that meets roughly once a month. We talk about issues of concern. We have talked about SBREFA there. We have alerted the responsible people at the agencies to the kinds of responsibilities that they have, and in that way, we have encouraged them to make the changes that we think are appropriate and that we are, in fact, seeing among the agencies.

Chairman BOND. Mr. Glover, it is clear that you have got the ball now, whether you are Rodney Dangerfield or Rocky.

One of the things that is of concern is some lack of clarity in what the agencies are doing in defining crucial Regulatory Flexibility terms; for example, significant impacts, substantial number of small entities.

It appears to me that some of the existing guidance may be contrary to the Regulatory Flexibility Act. EPA's early guidance, for example, on significant impact required a disproportionate impact on small entities, even though I do not think the Act intended to single out only a disproportional impact.

You have got the lead. What are you doing, and how is your office responding to interpretations which may not be consistent from agency to agency, and if you have a view as to whether they are not consistent with the legislation themselves?

Mr. GLOVER. We have not been given the authority to issue regulations interpreting the Regulatory Flexibility Act.

Having said that, we think that guidance is appropriate. We have put out our compliance guide in which we do define or, at least, in which we do set out some policy statements as to how we think those terms should be defined. We, of course, urge the agencies err on the side of inclusion and making the definition broader, including as many small businesses as possible.

I think that, where we see an agency is clearly using some other standards, we will continue to point that out as we have in the past. Quite candidly, fear is a wonderful motivator. I think the agencies will want their rules to be sustained. I do not think they will want to face judicial review. They certainly do not want the Office of Advocacy filing an amicus brief on critical issues such as "significant impact" or "substantial number."

I think agencies will err on the side of inclusion. If they do not, we will certainly point that out. At the very least, we will point it out in our annual report to Congress, and, as I have said, we may well point it out in an amicus brief.

Chairman BOND. If you need any assistance in instilling that sense in the agencies, if you have trouble, we are available to assist in expediting and implementing the terms of the statute.

A question to either of you, but section 610 requires agencies to have a plan to review regulations affecting small business every year and to publish and seek comment on an annual list.

Several agencies have written back to us claiming their semiannual agencies which are required by section 602 of Regulatory Flexibility, satisfy the requirements to review rules under section 610. That is not my understanding. That is certainly not what we meant.

The semiannual agendas just give small business early notice of forthcoming rulemaking. Section 610 was designed to force agencies systematically to go back and look at all the rules that affect small business. We were trying to figure out a way to deal with rules and regulations already in place.

Some people had said we should review all regulations. We said that is not practicable. There ought to be an orderly procedure to review rules which have generated a great deal of problems, and this was what we thought was an orderly process to get them to look at the ones which are most objectionable, publish a list, and then get comments because they may not want to review some of the rules and regulations they like the most, but that the small business hates the most, and we wanted a responsible process for bringing that up.

What is being done or what can be done to see that we carry out this orderly process of revisiting and reviewing rules under section 610?

Ms. KATZEN. If I could start on this issue—just to put it in context—section 610 itself was not changed in this latest statute. What was changed was that judicial review of that provision was authorized, but section 610 dates back to the original Regulatory Flexibility Act.

In the early 1980s, with the creation of the Unified Regulatory Agenda, there was a conscious effort made to include indices within the Unified Agenda to identify those regulations that had a significant economic impact on a substantial number of small businesses. This was done not just to give the small businesses early warning. It was also happening so they could track them—so that people could look at the Unified Agenda in terms of sector-specific interests.

When we were drafting Executive order 12866—that you referred to earlier—for President Clinton's signature early in his Administration, we included a provision that said that agencies may incorporate in the Unified Agenda the information required under the Regulatory Flexibility Act, et cetera. That language was taken, I believe, almost verbatim from the Reagan Executive order that was written in 1981 that was close to or contemporaneous with the original Regulatory Flexibility Act. So we have not changed the way we have been treating either the compilation of materials or the review of materials.

It has proven to be very useful for small businesses and big businesses to be able to track proposed regulations through the Unified Agenda. It tells you quite clearly what the agency is reviewing and by implication, clear implication, what it is not choosing to review in the upcoming year. That being the case, there are a host of ways of bringing these issues to the agencies' attention directly, as we have seen in the last several years as we have been working on the regulatory reform efforts. Jere may have additional information on this issue. I just wanted to put that into historical context.

Mr. GLOVER. I think judicial review of two provisions, 609 and 610, is very beneficial in both cases. Obviously, the requirement to go out and seek comments, get information and get small business involvement, making that part of the process reviewable is impor-

tant. But I also think the judicial review of the periodic review of the rules is equally important.

I will leave to others, probably a court of competent jurisdiction, to determine how to deal with the existing inventory of rules and regulations.

On the other hand, it is important that agencies comply with the 10-year review process.

I think one of the things we are likely to do is ask agencies, in preparation for our annual report to Congress, how they are doing on their review of regulations that were put into place 10 years previously. The law is relatively clear that they should be doing that specifically. When I looked at the previous chief counsel's annual reports, I found that periodic reviews to be spotty amongst the agencies. Some took it seriously and some did not, but then, this is going back some 15 years.

Chairman BOND. I appreciate your comments on that but I think that it is very important that the agencies not lose sight of the 610 reviews, not just to be buried in the semi-annual agendas. We think that these can be very important, as I think you indicated, and we would expect that to be carried out.

Ms. Katzen, we had a Paperwork Reduction Act hearing in this Committee June 5. GAO indicated that OIRA had not set any specific burden reduction goals and that information submitted by the agencies, at least in GAO's thought, would result in less than a 1 percent actual burden reduction. What have you all done in that area, and what is the status of that effort?

Ms. KATZEN. This turned out to be far more difficult, in a variety of ways, than we had anticipated. In order to establish a reduction, we had to have a baseline. While that sounds easy since we have been compiling the information collection burden for the last 20 years at least, in the 1995 amendments to the Paperwork Reduction Act, the definition of "information request" changed—with our acquiescence, and indeed, encouragement—to include, for example, third party notifications.

The statute also changed the definition of "burden" to include, for example, capital investments in equipment needed for monitoring to obtain the information to be reported.

So the first thing that had to occur was for the agencies to recalculate the 1995 baseline, since that information had not heretofore been collected. We gave the agencies until December 1995 to provide that information to us because of their, I think, very legitimate concerns about their inability to do so on a faster track. Then you may recall that in December we not only had some snowstorms, we also had prolonged Government shutdowns. Most of the regulatory agencies were not up and functioning and able to carry on normal business, let alone able to go back and try to do this kind of calculation. So the information was sent to us much later than we expected in the mid-spring.

When I saw the data I had about the same reaction that GAO did—that this is not an adequate reduction, considering how important this area is and that the President himself in signing the Paperwork Reduction Act of 1995 had made a very strong statement of his commitment to reducing the paperwork burden. He had also announced initiatives for reducing the frequency of reports and

other paperwork burdens. I was not exactly ecstatic with the results as I saw them.

As I mentioned earlier, we have a regulatory working group. Rather than rushing to the printer with this agency data, I went back to that group and said, we have a problem. This is serious. We are not receiving the kinds of responses that we need to have. This is a commitment of the President and I need you all to help make it happen.

One of the things that I heard in response that I do take seriously is that there are a lot of ongoing initiatives—for example, reductions in the frequency of reporting and the elimination of regulations that have been underway for the last several years—whose results have not shown up yet. The agencies were not quite sure what that could produce or when, and they did not want to overestimate. They were worried that since they had not completed their initiatives, their estimates might not be reliable.

We had a beneficial discussion which, if nothing else, brought home the seriousness of the problem and the importance of the issue to these people. Some of the agencies then revised their numbers.

My understanding is that the document is at the printers and should be available shortly. We will obviously get you a copy as soon as we have it. In fact, if you would like it in galleys, we will get it for you in galleys.

I think that there is important work to be done. We have a very long way to go. Some of the reductions can be achieved by better use of information technology such as electronic reporting, which will substantially reduce the burden of some types of reporting. Putting in place that kind of information technology in the agencies is costly. A lot of the agencies are feeling, as you well know, a lot of pressure on their overhead budgets, or on their information technology budgets, and their plans to begin to implement some of these changes are being phased in more slowly than they had hoped.

I am not trying here to give excuses, but rather explain some of the things that we are working with. We are determined to keep working and to work even harder in this regard.

Chairman BOND. We appreciate that commitment. I would have to say that a number of my colleagues looking at the increase in regulations issued prior to the effective date suggested that small business could not afford another Paperwork Reduction Act if it brought out of the agencies so many rules and regulations getting in under the deadline.

Ms. KATZEN. No, a lot of those were because of the change in definition. I am sorry, I did not mean to interrupt. But the agencies needed to have a valid number as of a certain date on a large number of information collections—many in rules—that had been out there but had not been covered. Those needed to go through our processes, which is what we did.

We did not have that same bunching up in terms of regulations before the effective date of SBREFA. You wrote me a letter specifically asking whether there was any increase, and my response—in which I looked at, I think, both the immediate period and a several week period or several month period from the date that the law

was actually passed—was there was no increase. In fact, the figures suggest there was a slowing down of regulatory activity. So there was no rush out of the door on this one.

I do not mean to come on strong, but I just want to refer to——

Chairman BOND. Well, we will be coming on strong and working with you to see that, where we can, that the Paperwork Reduction Act mandates are carried out.

Thank you very much, Ms. Katzen and Mr. Glover. As always, we will leave the record open for questions that any of the members of the Committee wish to submit, and we would appreciate your written responses to those in a timely fashion. Thank you very much for being with us today.

Ms. KATZEN. Thank you.

Mr. GLOVER. Thank you.

Chairman BOND. We are very pleased now to call the second panel, Mr. William M. Smiland, Esq., co-owner of the Smiland Paint Company, Los Angeles, California. He is accompanied by Mr. Richard Hardy, president of XIM Products, Inc., Westlake, Ohio; Ms. Jean Smith Mohler, assistant counsel of Petroleum Marketers Association of America in Arlington, Virginia; and Mr. Willis J. Goldsmith, partner of Jones, Day, Reavis & Pogue of Washington, DC.

Good afternoon. Let me turn first to Mr. Smiland and apologize for having to ask you to stay over another day, and ask if you would present your testimony. Thank you.

STATEMENT OF WILLIAM M. SMILAND, ESQ., CO-OWNER, SMILAND PAINT COMPANY, LOS ANGELES, CALIFORNIA

Mr. SMILAND. Thank you, Mr. Chairman. My name is William Smiland. I live in Los Angeles where I co-own a family paint business, I practice law, and I also used to be a clean air regulator at one time.

On June 25, 1996, EPA proposed a national rule which would dictate the solvent content of architectural coatings. In my view, it is a textbook case of the economic harm regulation can have on small business and on competition, and it cries out for careful thought. The new act calls for fundamental changes, but I must say to you that from my perspective I see business as usual.

I will focus on whether EPA is implementing four provisions of the Act. In each instance it is my opinion that EPA failed to honor congressional mandates, or at the very least, failed to exercise statutory discretion in a way which was fully protective of small business.

First, EPA was bound to designate a small business advocacy chairperson not later than April 28, 1996. This did not happen until around June 11 and the delay came at a very crucial time. Parenthetically I might note, Mr. Chairman, that I represented a paint company out in California who was once 6 weeks late on an EPA deadline and there the result was a civil suit for a multimillion dollar fine.

Second, the initial regulatory flexibility impact analysis EPA had prepared by the proposal date, in my view does not satisfy the act. It fails to describe the impact of Phase I limits which are effective approximately 6 months after promulgation on small manufactur-

ers, especially those outside of previously regulated areas. It contains no discussion of differing timetables or other alternatives which would minimize the impact of those limits.

As Mr. Hardy, my partner, will testify, most small manufacturers lack the time and the money to reformulate and test and market their entire product line in 6 months. My company had 19 years under the California rules, and it is just not easy to do.

EPA also fails to describe the reasons why even more draconian product bans are being considered in Phase II of regulation. When EPA made that threat in its preamble it should previously have done the homework necessary to justify it. That threat alone creates a real stigma affecting the market values of these companies. EPA also totally ignores the impact of both Phase I and Phase II on about 40,000 retail outlets and about 30,000 painting contractors.

Third, either a complying initial analysis, or at least a summary thereof, must be published in the *Federal Register*. EPA did not publish the document it claimed as an initial analysis but merely filed that in the docket. I also can find no summary of the document in the preamble. The very brief discussion of small business impacts omits several very key facts.

Fourth, effective June 28, as you know, the statute mandates that EPA shall provide SBA with information, convene a three-agency panel and report on that, and where appropriate, modify either the analysis or the rule or both. Here EPA chose not to provide that information, convene that panel, or make those modifications.

These four failures by EPA to carry out statutory mandates, or at least to take actions well within the scope of its discretion, have been very harmful. Had EPA taken the above steps it would have been forced to come to grips with the very compelling grounds for extending that Phase I effective date not to just 6 months, but something like 6 years. Active implementation of the new statute would also have shown that Phase II bans that EPA recklessly threatens would be disastrous.

In conclusion of my portion of our section, I would like to say that SBREFA is indeed a very promising act. We think that EPA's proposed paint rule presented a perfect opportunity and would have set an excellent precedent for its implementation. But I deeply regret, and I think all Americans should, that EPA has so stubbornly refused to use it in the paint situation.

I would like to turn the balance of my time, if I may, to Mr. Hardy.

[The prepared statement and attachment of Mr. Smiland follow:]

ORAL REMARKS OF WILLIAM M. SMILAND
CO-OWNER, SMILAND PAINT COMPANY
BEFORE THE
U.S. SENATE COMMITTEE ON SMALL BUSINESS

JULY 24, 1996

On June 25, 1996, EPA proposed a national rule limiting the volatile organic compound content of architectural coatings. It presents a textbook case of the adverse economic effects regulation can have on small business and competition. It cries out for analysis under the Regulatory Flexibility Act, as recently strengthened by new Subtitle D of the Small Business Regulatory Enforcement Fairness Act of 1996.

I live in Los Angeles where I co-own a family paint business, practice environmental law, and served as a clean air regulator.

o Under Section 244 (b) of Subtitle D, enacted March 29, 1996, EPA was bound to "designate" a small business advocacy chairperson "[n]ot later than" April 28, 1996. EPA did not do that until about June 11, 1996.

Section 244 (b) also mandates that EPA's chairperson shall "be responsible for implementing" new Section 609(b) of the Reg Flex Act. EPA's chairperson took no steps after his designation to fulfill that responsibility.

o On June 25, 1996, three days before the effectiveness of Subtitle D, EPA published its preamble. The initial regulatory flexibility impact analysis EPA had prepared by that date did not satisfy the requirements of Section 603 of the Reg Flex Act, as amended by Subtitle D.

EPA's initial analysis fails to describe the "impact" of phase one VOC limits, effective six months after promulgation, on small manufacturers with more than $10 million of annual sales but less than 500 employees, especially those operating mainly outside of previously regulated areas.

The initial analysis contains no discussion of "differing . . . timetables" or other "alternatives" which would "minimize" the near-term impact of the phase one limits. As Mr. Hardy will testify, most small manufacturers lack the time to test, and the money to reformulate, most of their products within the short time frame proposed.

EPA's initial analysis also fails to describe the "reasons why" even more draconian product bans are "being considered" in a second phase of regulation. When EPA made such a threat, it should have done the homework essential to justify it. The resulting stigma, alone, has an immediate and massive adverse impact on the market value of small paint companies.

EPA's initial analysis also totally ignores the impact of these limits on tens of thousands of retail paint dealers and tens of thousands of painting contractors. These impacts include reduced choices, higher costs, job failures, and a less competitive supplier market.

o Under Section 603 an initial analysis "or a summary thereof" shall be published in the Federal Register.

EPA elected not to publish the document it claims as its initial analysis, but merely to include it in the public docket.

I find no "summary" of its purported initial analysis in the preamble, either. The brief discussion of small business impacts in the preamble omits, for example, the admittedly key fact that coatings made by small manufacturers have a higher VOC content than the industry average.

o Subtitle D added new Section 609(b) to the Reg Flex Act, effective on June 28, 1996. Section 609(b) mandates that EPA shall (1) "provide" SBA with "information;" (2) "convene a review panel" of EPA, OMB, and SBA officials to "review" such information, "collect advice and recommendations" of small business representatives identified by SBA, and "report" on the representatives' comments and the panel's findings; and (3) where appropriate, "modify" the initial analysis or the proposed rule. None of these things happened.

o Finally, Section 609(a) of the Reg Flex Act, as amended by Subtitle D, mandates that EPA shall "assure" that impacted small businesses have been given an "opportunity to participate" in the rulemaking through the "reasonable use" of techniques such as "direct notification" of interested small businesses. I understand that EPA has given no direct notification to painting contractors or retail dealers, nor taken any other steps to assure that they participate.

These failures by EPA to carry out statutory mandates or, at least, actions well within its discretion have been extremely harmful. Had EPA taken the above steps, it would have been forced to come to grips with the reality of *de facto* bans, and had compelling grounds to propose a phase one effective date several years, rather than six months, after promulgation.

Active implementation of the Reg Flex Act and Subtitle D would also have demonstrated that the phase two bans EPA recklessly threatens would be both economically and environmentally disastrous.

SBREFA is very promising. EPA's proposed paint rule presented a perfect opportunity, and would have set an excellent precedent. I deeply regret -- and all Americans should regret -- that EPA refused to implement it in this case.

STATEMENT OF WILLIAM M. SMILAND
CO-OWNER, SMILAND PAINT COMPANY

to

COMMITTEE ON SMALL BUSINESS
UNITED STATES SENATE

re

ENVIRONMENTAL PROTECTION AGENCY
IMPLEMENTATION OF SMALL BUSINESS LEGISLATION FOR
ARCHITECTURAL COATINGS REGULATION
PROPOSED UNDER CLEAN AIR ACT

July 24, 1996

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I. INTRODUCTION

I appreciate the Committee's invitation to make this statement in connection with its July 23, 1996 hearing relating to the implementation of Subtitle D of the Small Business Regulatory Enforcement Fairness Act of 1996, which was enacted on March 29, 1996 to strengthen the pre-existing Regulatory Flexibility Act.

I shall focus in particular on the U.S. Environmental Protection Agency's failures to take certain steps under the RFA, as amended by Subtitle D of SBREFA, in connection with a national regulation of architectural coatings proposed on June 25, 1996 under Section 183(e) of the 1990 Amendments to the Clean Air Act, which governs emissions of volatile organic compounds from consumer and commercial products.

My main message to the Committee is threefold:

First, EPA's proposed paint rule is a significant one. It has a long and controversial lineage in California and several other locales. It is now among the first of many regulations to follow under a massive new CAA program. It raises textbook issues, not only about air pollution, but about small business and anti-competitive effects of clean air regulation.

Second, in my opinion, EPA is not implementing the RFA, as amended by SBREFA, in accordance with certain of its mandates, nor is EPA exercising certain discretion it has been given in a way which is protective of small business. Its initial regulatory flexibility analysis did not describe impacts on most contractors and retailers and many manufacturers nor alternative methods of regulation which would mitigate the impacts. EPA did not designate its small business advocacy chairperson in a timely manner. EPA did not utilize the new three-agency review panel process. EPA did not publish its would-be initial analysis nor the regulation, itself, in its Federal Register notice. And EPA is not assuring contractor and retailer participation in the rulemaking.

Third, the EPA's failures to implement the RFA, as amended by SBREFA, are not mere academic or ideological concerns. They have had, and will have, severe -- in some cases, fatal -- impacts on hundreds of small manufacturers, thousands of small retailers, and thousands of small contractors across the nation.

II. WITNESS BACKGROUND

I bring to the subject matter of the Committee's hearing experience in three relevant areas, as a paint

manufacturer, a practicing lawyer, and a former air quality regulator.

A. PAINT MANUFACTURING

My principal asset is stock in a family-owned and -operated paint manufacturing business. My father founded, my younger brother and I co-own, and he manages, Smiland Paint Company. I am an officer and a director of the Company and act as its general counsel. With facilities in Los Angeles and Commerce, California, Smiland Paint manufactures and distributes a wide variety of architectural coatings including "Morwear," "Styletone," "Whiteline," and various private brands through independent paint stores, hardware stores, lumber yards, and home center chains throughout the West and the Pacific Rim. The Company employs about 115 people.

Smiland Paint also manages, supplies, and co-owns with another paint manufacturer Conco Paint Company. Conco Paint markets the "Conco•Pro" brand of paint and coatings through several hundred retail outlets of a leading home center chain to professional painters and contractors in the West and Central regions of the country. Conco provides jobs to about 65 people.

Smiland Paint and, more recently, Conco Paint have been very active in several trade groups interested in the regulation by air pollution control agencies of the VOC content of architectural coatings. In 1977 Smiland Paint co-founded the Ad Hoc Committee of Small California Paint Manufacturers, and it is currently part of a group of paint manufacturers, dealers, and contractors which has mounted successful court challenges to certain California regulations. It is also active in the Environmental, Legislative, and Regulatory Advocacy Program, a Southern California trade group, as well as the Allied Local and Regional Manufacturers Caucus, a national group of paint companies. On March 15, 1995 Smiland Paint and Conco Paint were two of 21 American paint manufacturers which submitted to the 104th Congress the paper titled "Outlawing Paint In The Name of Clean Air: A Prime Example of Regulatory Failure." In recent months, both Smiland Paint and Conco Paint joined with more than 125 other manufacturers across the country to form the Paint Industries Task Force For True Ozone Policy.

B. LAW PRACTICE

I primarily make my living in the private practice of law in Southern California. I am a member of the Los Angeles and San Clemente law firm of Smiland & Khachigian. Ours is a general business practice, but we focus heavily on matters relating to government regulation, natural resources, and the environment.

During the past two decades I have represented numerous companies and trade groups impacted by local, state, or federal regulation of air pollution.

In particular, since 1977 my law firm and I have acted as counsel for numerous paint manufacturers, independent dealers, and painting contractors. Our clients have included members of the Ad Hoc Committee of Small California Paint Manufacturers in the early years and more recently the California companies which successfully challenged California local regulations on the VOC content of paint.

C. CLEAN AIR REGULATION

I also served for four years as a clean air regulator. Between 1983 and 1987, I was California Governor George Deukmejian's appointee to the governing board of the South Coast Air Quality Management District. With a staff of about a thousand people and an annual budget of about $100,000,000, the South Coast AQMD adopts and enforces air pollution control rules for most sources of air pollution in Los Angeles, Orange, San Bernardino, and Riverside Counties.

As Chair of the South Coast AQMD board's Small Business Committee, I frequently came face-to-face with the harsh economic impacts so many air pollution control rules impose on small businesses.

III. ANALYTICAL BACKGROUND

A. OZONE AND POLLUTION

One of the major targets of clean air regulation for 25 years has been ozone. Ozone (O_3) is a gaseous allotrope of oxygen that may be formed naturally from diatomic oxygen. In certain respects ozone is a benign or even beneficial gas. Ozone occurs extensively in nature, is not visible, is useful as a disinfectant, and is in short supply in the upper atmosphere. However, when present at ground-level in high concentrations ozone is a contributor to urban "smog". Exposure to excessive ozone on hot summer afternoons causes transitory irritation to the lungs of sensitive persons and persons who engage in physically exerting behavior.

B. VOC AND PAINT

Ozone may also be formed when sunlight interacts with VOC and oxides of nitrogen. No_x comes from combustion, especially the burning of fossil fuels in motor vehicles, oil refineries, and power plants.

VOC sources include vehicle exhaust, gasoline evaporation, and other industrial processes, although more than half the VOCs in the air occur naturally from biogenic sources such as trees and vegetation. Hundreds of VOC species are also found in consumer and commercial products. Paint and coatings contribute only a tiny fraction -- less than one percent -- of the VOC emitted into the air from all sources.

Upon the application of architectural coatings VOC is emitted into the air. Two major species of VOC are found in paint.

The carrier in traditional solvent-borne coatings (especially glossy enamels and specialty coatings) is usually mineral spirits. A liter of such coating often has more than 400 grams of mineral spirits.

The VOCs in water-borne coatings (especially flat wall paints) often consists of various glycol compounds. Such products often contain less than 200 g/L of such VOCs.

C. PAINT INDUSTRY

EPA's June 1996 draft report on economic impacts of its proposed regulation (which contains its purported initial regulatory flexibility analysis under the RFA) states, citing government sources, that the architectural coatings industry is "basically divided into two groups: a few, well-financed and highly diversified multinationals and a large number of regional paint companies."

The few, well-financed and highly diversified multinationals tend to be publicly-owned companies. They are often vertically integrated, with their own retail outlets. They utilize mass-market media advertising to attract "do-it-yourself" painters. They emphasize water-borne products as a matter of marketing strategy.

The large number of regional paint companies referred to by EPA tend to be privately-owned. Their direct customers are paint dealers and painting contractors -- independent experts. Sales, therefore, depend on high quality, reasonable price, and good service. These manufacturers rely much more heavily on solvent-borne enamels and specialty products.

D. VOC LIMITS

For nearly 20 years certain clean air regulators have targeted architectural coatings for regulation, but only in California and a few other places. The basic regulatory strategy

has been to set VOC content limits and outlaw the paints not meeting those limits.

(1) Reformulation Limits

Most so-called "reformulation" limits have aimed at removing excess or unnecessary VOC from paint formulas. This requires a manufacturer to reformulate each of his products, an expensive, lengthy, and risky process. But given enough time, most manufacturers have proved able to meet most such limits. EPA now proposes such limits nationwide, but with an extremely quick effective date.

(2) Substitution Limits

California regulators have attempted on several occasions to impose -- and EPA now threatens to impose in a second phase of regulation -- much more extreme or so-called "substitution" limits. In such cases, the product cannot satisfactorily be reformulated, even with sufficient time and money. Accordingly, the manufacturer must remove or withdraw the product from his line. Such limits have the effect of outlawing products -- often the best ones.

(3) De Facto Substitution Limits

A third type of limit, while reformulation in name, produces substitution in effect. This is a limit which, with sufficient time and money, could be successfully reformulated, but which goes into effect before the manufacturer has time to develop and test the product, or before he can finance the necessary expenses. I call this "*de facto* substitution," and it is a principal feature of phase one of EPA's proposed rule.

E. THE BIG ISSUES

The regulatory debate in the past two decades of paint regulation has centered on two central questions. Each may seem paradoxical to the casual observer. But to those familiar with the realities of regulation, they come as no surprise.

(1) Anti-Competitive Effects on Small Business

Traditionally the paint industry has been highly competitive -- a classic case of perfect competition. The last several decades have seen, however, a marked trend toward ever-accelerating concentration, as smaller companies are acquired by larger ones or go out of business. Regulation has, in my view, greatly exacerbated this trend.

Small manufacturers have generally not challenged reasonable reformulation limits. But in those rare occasions where regulations have attempted substitution limits (and, now, *de facto* substitution limits), they resist.

It is widely recognized that regulations and, in particular, environmental regulations have particularly harsh effects on small business and that regulation has often had the primary effect of promoting the competitive positions of certain well-placed industries or companies as against their less influential competitors.[1]

As the SBA said in its October 1995 report to Congress:

> ". . . [T]he regulatory burden falls more heavily on small firms. . . .
>
> "This inequitable cost allocation gives large firms a competitive advantage, a result at odds with the national interest in maintaining a viable, dynamic, and progressive role for small businesses in the American economy. . . . [A]n equitable allocation of regulatory costs is not good public policy."

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[1] Hays, "Political Choice In Regulatory Administration" in McCraw, Regulation In Perspective: Historical Essays (1981) at 134; Vogel, "The 'New' Social Regulation In Historical And Comparative Perspective," Id. at 174; Rabin, "Federal Regulation In Historical Perspective," 38 Stan. L. Rev. 1189, 1226, 1245, 1257 (1986); Breyer, Regulation And Its Reform (1982) at 269-70; Noll, Owen, The Political Economy Of Deregulation: Interest Groups In the Regulatory Process (1983) at 39. Economists have shown that regulations affect some persons adversely, and others beneficially. As stated by a leading study, "every act of government . . . creates winners and losers within the competitive sector of the economy. . . ." Leone, Who Profits: Winners, Losers, And Government Regulation (1986) at 3. This phenomenon is particularly evident in environmental regulations promoted by interest groups which have the effect of "constraining competitors from producing certain goods." Id. at 17. Another leading economist has written: ". . . [N]o matter how disinterested the goal of public policy, the policy is bent to politically influential groups at the cost of the less influential. The Clean Air Acts provide striking examples. . . . The abatement of air pollution, an admirable social goal, is largely thwarted by these special interest policies." Stigler, Memories Of An Unregulated Economist (1988) at 119-20.

The SBA report went on to say:

> ". . . [W]ith every new regulation that increases fixed costs, a number of existing small firms may be forced to leave the industry because they cannot cover the additional costs of the regulations. Competition within an industry will decrease, and the industry structure will become more dominated by large firms."

In 1988 South Coast AQMD commissioned ICF Consulting Associates, Inc. to study the effect of its rules on small business, as mandated by state law. ICF's June 17, 1988 report reviewed, among other things, South Coast AQMD's architectural coatings rule, with a view to identifying such impacts. The report concluded, as follows: the rule has "significant economic impacts" on local manufacturers and independent dealers; the affected businesses "face regulatory costs that are not faced by other members of the industry"; such costs include "[p]ermanent sales losses"; such businesses "are unable to pass compliance costs through to consumers"; and, accordingly, only a very few such businesses are expected to "survive."

Certain of the "few, well-financed and highly diversified multinationals" referred to by EPA have been admirably candid about the anti-competitive effects of clean air rules limiting the VOC content of paints.[2]

Certain such manufacturers have tended to support substitution or *de facto* substitution limits, as they do not

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[2] ICI, a British corporation, is one of the largest paint manufacturers in the world. Glidden, one of the largest manufacturers in the U.S., is a division of ICI. ICI-Glidden has acknowledged that uniform substitution limits provide it with a "competitive edge." Chemical & Engineering News, (Oct. 30, 1989) at 41. ICI-Glidden's general counsel wrote this in a July 17, 1991 letter to his trade association: "Even under the most favorable of circumstances, the adoption of uniform environmental regulations can have drastically different effects on companies within an industry. In the case of paints and coatings, VOC restrictions placed upon one category of coatings can prove to be economically disastrous to one manufacturer while being quite manageable to another."

specialize in the high-quality enamels or specialty coatings at primary risk. Examples of such support abound.[3]

Naturally, clean air regulators are receptive to such support from those within the industry to be regulated. For example, the preamble recently published by EPA offers the following rationale for regulation. "For the companies that market architectural coatings in different states, trying to fulfill the differing requirements of State rules has created administrative, technical, and marketing problems. A Federal rule is expected to provide some degree of consistency, predictability, and administrative ease for the industry." From the perspective of a small business person, uniform reformulation limits may be tolerable but, as applied to substitution or *de facto* substitution limits, "uniformity" is a code word for disaster, not just in a few isolated locales, but everywhere.

(2) Counter-Productive Effects on Ozone

The second overriding issue -- again, an apparent paradox -- is whether clean air rules, substitution or *de facto* substitution limits in particular, decrease or increase ozone pollution. In my opinion, the weight of the current scientific evidence clearly supports the claim that such rules are counter-productive.[4]

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[3] For example, Sherwin Williams Company, one of the largest architectural coatings manufacturers in America, "testified in favor" and "approved" of South Coast AQMD's original adoption of certain substitution limits on February 2, 1990. Dunn-Edwards v. South Coast AQMD, 19 Cal.App.4th at 528 n. 5, 529. In February 1992 the Bay Area AQMD wrote to my law firm saying it had received "considerable pressure from competitors" of our clients to enforce its substitution limits, even though such amendments had already been invalidated in court.

[4] Preliminarily, it should be noted that Section 183(e) of the CAA and other 1990 Amendments thereto relating to VOC were based on the premise -- widely assumed true at the time -- that at least some VOCs in consumer and commercial products contribute to ozone pollution in at least some areas of the country. The correctness of this premise is much less clear today in light of subsequent data. Indeed, recent research powerfully suggests that No_x, not VOC, is the dominant cause of the ozone problem and that the assault on VOC, which has been the heart of the anti-ozone strategy for two decades, has been to a major extent unnecessary. A major study required by the 1990 CAA Amendments finds that "No_x control is necessary for effective reduction of

(continued...)

Even if VOC species in paint contributed to excessive ozone in all areas, which they do not, substitution and *de facto* substitution limits on paint force consumers to use products which are even more problematic under the circumstances. On this basis, a group of California paint companies my law firm represented brought three successful challenges to such rules under California's "mini-NEPA" statute.

On February 2, 1990 South Coast AQMD adopted substitution limits relating to five categories of enamels or specialty products. Those amendments were set aside as unlawful on August 21, 1990 by the Honorable David P. Yaffe, Judge of the Los Angeles Superior Court. The court found that the South Coast AQMD had failed to adequately address certain issues relating to the ban in the manner required by law and issued a writ of mandate compelling it to do so before any attempt at re-adoption. Dunn-Edwards Corp. v South Coast AQMD, 19 Cal.App.4th at 522. Judge Yaffe stated that the agency had "ducked" the impacts in question and taken an "ostrich-like" attitude toward them. The South Coast AQMD voluntarily dismissed an appeal it had initially taken from the judgment. Id. at 522 n.1.

Bay Area AQMD adopted rule amendments on January 17, 1990 which included limits substantially identical to limits adopted by South Coast AQMD. The Honorable Stuart R. Pollak, Judge of the San Francisco Superior Court, set them aside for violation of California's mini-NEPA law in a second trial. That judgment was upheld by the Court of Appeal in the leading case of Dunn-Edwards Corp. v. Bay Area AQMD, 9 Cal.App.4th 644 (1992). The appellate court said this about how substitution limits may result in more usage and, therefore, more VOC emissions:

> "Plaintiffs presented evidence of several adverse impacts which would result from the

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[4](...continued)
ozone" in many areas and recommends that to substantially reduce ozone "the control of No_x emissions will probably be necessary in addition to, or instead of, the control of VOCs." National Resource Counsel, Rethinking The Ozone Problem In Urban and Regional Air Pollution (1991) at 11. As one of that study's authors and leading scientific experts has written: ". . . . [A] mounting body of evidence now suggests that the nation's ozone-control strategy has significant flaws." Chameides, "Controlling Urban Ozone," Natural Science (Aug. 1993) at 193. He concludes: "The inference is that No_x, not VOCs, is driving the production of ozone and that the effective control of this pollution will require the imposition of No_x -- rather than VOC -- emissions controls." Id. at 195.

> amended regulations: 1) Because of the lower quality of products under the amended regulations, users must apply more primers, sealers and undercoats to insure proper adhesion. 2) Because the solvent-borne coatings are difficult to handle and apply, users add solvent thinners to factory-prepared coatings. 3) Due to the fact that some newly mandated products produce a thicker film, more product is required to cover the same area. 4) It is necessary to apply more coats of the new products than of the old, because the new products do not hide as well as the traditional products. 5) Many coating applications have to be redone due to the low quality of the new products. 6) Since the new products have impaired durability, painting applications deteriorate sooner and have to be redone more frequently. In sum, there is evidence that the new regulations require lower quality products. As a result, more product will be used, which will lead to a net increase in VOC emissions." 9 Cal.App.4th at 657-58.

Ventura County APCD adopted similar rule amendments. They, too, were invalidated after still another trial by the Honorable William Huss of the Los Angeles Superior Court for failure to comply with the same law. Ventura County APCD elected not to appeal Judge Huss' decision.

The judgments rendered against Bay Area AQMD and Ventura APCD also invalidated rules for each agency's failure to analyze the air quality impact due to "increased reactivity" of the glycol compounds and other VOCs in the substituted products. Scientists and some regulators are increasingly beginning to focus on this key issue of reactivity.[5]

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[5] The California Air Resources Board has recently confirmed that the majority scientific view supports the use of reactivity scaling in clean air regulation. 47-Z Cal.Reg.Not.Reg. 92 (Nov. 4, 1992). The CARB there said: "The concept that different hydrocarbons react at different rates is supported by a large body of theoretical, laboratory and observational data . . . ." Id. at 1535. ARB undoubtedly had in mind work such as that currently being conducted by Professors Carter and Weiner at U.C. Riverside and Professor Chameides at Georgia Tech. The National Research Council study performed under the 1990 CAA Amendments states that ". . . VOCs vary widely in the speed with which they react in the troposphere and in the extent to which they promote . . . ozone formation. . . ."

(continued...)

A major challenge for EPA in implementing all of its consumer and commercial product rules will be to deal with these basic scientific issues to insure that regulation does more good than harm.[6]

IV. HISTORICAL BACKGROUND

For 19 years EPA has been involved in efforts to outlaw high-quality low-priced architectural coatings. Please consider the following cases.

A. EPA ROLE IN CALIFORNIA EXPERIMENT

In our federal system of government a law enacted by a state or locality can often serve as a "laboratory experiment" or a "pilot project" for national lawmakers. California's regulation of architectural coatings during the past 19 years, with the encouragement and participation of EPA, provides a particularly instructive example of the disastrous results such regulation can produce.

In 1977 the CARB in conjunction with EPA, adopted a so-called "model rule" for the regulation of VOC content in architectural coatings. The model rule applied to virtually all categories of coatings and limited them to 250 g/L of VOC. That level required the substitution of inferior products for many categories of architectural coatings. By 1981 it had become painfully evident that the "one size fits all" model rule was creating both economic and environmental harm. In 1981 the VOC limits and deadlines for compliance were substantially relaxed. At that time more categories of coatings were defined, each being assigned a separate VOC limit.

In 1978 EPA retained Acurex Corporation to prepare a control technique guideline for architectural coatings. In 1980 EPA hired a new consultant, Engineering Sciences, Inc., to complete the work begun by Acurex. Both Acurex and Engineering Sciences concluded that the potential substitute coatings did not

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[5](...continued)
Rethinking The Ozone Problem at 153.

[6] Leading studies question whether EPA is ready, willing, and able to rise to the occasion. E.g., Landy, Roberts, Thomas The Environment Protection Agency: Asking the Wrong Questions From Nixon to Clinton (1994) at 310-20; Graham, "Making Sense of Risk: An Agenda for Congress" in Hahn, ed., Risks, Costs and Lives Saved: Getting Better Results From Regulation (1996) at 196-99.

provide satisfactory alternatives to the products being considered for prohibition and recommended that VOC limits not be applied to non-flat or speciality coatings.

In 1987 EPA radically reversed its long-standing policy of deference to state and local reformulation regulations. EPA refused for the first time to approve VOC limits and compliance schedules submitted as revisions to California's state implementation plan. This scheme produced a series of "ghost" rules based on EPA's refusal to recognize the extension of compliance deadlines and increases in VOC limits adopted by the local regulators. The practical effect of EPA's actions was to outlaw all general purpose enamels.[7]

B. 1992-1994 REGULATORY NEGOTIATION

In July, 1994, EPA's ill-fated regulatory negotiation on a national VOC rule for coatings, which had lasted two years, ended. The ALARM Caucus submitted to the docket a document titled "A Retrospective Analysis Of The Reasons For The Failure To Achieve A Unanimous Agreement." This comprehensive 72 page report, prepared by the ALARM Caucus, a group of local and regional manufacturers, details the failures of the process.

In summary, according to the ALARM Caucus (whose view I share), a consensus was not reached for three reasons. First, the process was begun before EPA had complied with the study requirements of CAA Section 183(e) regarding the regulation of consumer and commercial products. Second, EPA selected a committee whose membership was not balanced by point of view as required by governing federal statutes. Third, the parties controlling the process, in an attempt to bolster the two above errors, resorted to various unfair procedural tactics designed to impose a rule requiring substitution limits.

C. 1995 FEDERAL IMPLEMENTATION PLAN

The CAA provides that if EPA disapproves a state implementation plan it must adopt a federal implementation plan that will meet the statutory requirements and take the place of the disapproved state plan. Successful judicial challenges to EPA's approval of certain revisions to California SIPs resulted in court orders requiring EPA to adopt a FIP for three areas of California.

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[7] EPA also aggressively pursued federal enforcement of the ghost rules. In one particularly brutal and vicious example, EPA sued to recover a civil penalty that was 32 times higher than the target established by EPA's own civil penalty policy.

On February 14, 1994, EPA proposed a FIP covering not only the local air pollution control districts covered by the court orders, but the entire state of California.

In addition to the sources covered in the disapproved SIPs, the proposed FIP contained substitution limits for architectural coatings that would have banned certain high quality and low priced coatings.

On April 10, a Department of Defense supplemental appropriations bill, Pub. L. No. 104-6, was enacted into law that provided that the FIP "shall be rescinded and shall have no further force and effect."

V. PROPOSED EPA RULE

As a foundation for regulation, EPA is required by law to conduct certain analyses of the general environmental and economic impacts of its rules. As shown below, EPA did not do this homework.

A. SECTION 183(e) STUDY

Section 183(e) of the 1990 CAA Amendments mandates that EPA shall conduct a study of VOC emissions from consumer and commercial products. The study was mandated to be completed and a report submitted to Congress "not later than" November 15, 1993. But EPA's report purporting to reflect the study was not submitted to Congress until March of 1995, 16 months late. The study, as reported, in my opinion, fails to meet the mandates of Congress in various respects.

The first purpose of the study is to "determine their potential to contribute to ozone levels" which violate the national standard. In my view, EPA did not make that determination. In particular, EPA did nothing to determine the potential of mineral spirit VOCs in solvent-borne paints to contribute to ozone. Nor did it make such a determination as to the very different glycol compound VOCs found in water-borne coatings. Nor did it make similar determinations as to various other more volatile VOCs found in other consumer and commercial products. Congress asked the crucial question; EPA did not answer it.

The second purpose of the study is to "establish criteria for regulating" categories of consumer and commercial products. In establishing such criteria, EPA "shall take into consideration" each of five factors specified in the statute.

One specified factor is those products subject to "the most cost-effective controls." EPA did not take into consideration cost-effectiveness, as mandated. Its report admits that there are "categories for which cost effectiveness data are unavailable." Having failed to consider cost-effectiveness, EPA promised, instead, to study the matter later "[i]n developing specific regulations," or "at the time of rule making."

Another factor EPA was required to consider in establishing regulatory criteria was those products which emit "highly reactive" VOCs. Again, EPA failed to do this, merely assuming (incorrectly) that virtually all of the VOC species in consumer and commercial products, including mineral spirits and glycol compounds, react with No_x identically. EPA admitted in its report to Congress, as follows:

> "Reactivity data on VOC, especially those compounds used to formulate consumer and commercial products, is extremely limited. Better data, which can be obtained only at great expense, is needed if the EPA is to consider relative photochemical reactivity in any VOC control strategy."

EPA further told Congress:

> "To meet these requirements, the Administrator must have either appropriate, quantitative data on the ozone-forming potentials, commonly referred to as 'reactivities,' of all VOC emission species associated with consumer and commercial products, or some other method for characterizing the impact of such VOC emissions on ambient ozone. Such data and methods currently exist but are known to have uncertainties and other limitations."

EPA also claimed that "existing reactivity data...are either largely incomplete or uncertain." Finally, EPA said: "Lacking detailed information related to the [reactivity] criterion, such a classification could not be and was not developed as part of this report to Congress."

On the other hand, EPA did "take into consideration" other factors -- factors not among the five specified in Section 183(e)(2) -- in establishing regulatory criteria.

One extra-statutory factor considered by EPA was "[m]agnitude of annual VOC emissions." This prejudiced high-volume products, no matter whether the VOCs they emitted contributed to ozone pollution or not.

A second factor outside the statute but considered by EPA was "[r]egulatory efficiency and program considerations." Use of this factor insured that EPA would continue to focus on selected products it had targeted for indirect regulation before enactment of Section 183(e) or for negotiated rulemaking before its report.

B. SECTION 183(e) LIST

Section 183(e)(3) mandates that EPA shall list consumer and commercial products accounting for 80% of VOC emissions from such products in non-attainment areas, and should divide the list into four groups establishing priorities for regulation in 1997, 1999, 2001, and 2003. EPA purported to publish such a four-part list on March 23, 1995.

Under the statute, the list shall be "based on the study" mandated by it, and the list shall be divided into four rounds "based on the criteria established" according to it. Because EPA never did the mandated study, in my view, it has never established the mandated list.

Section 183(e)(3) specifically directs that the list shall account for VOCs "on a reactivity-adjusted basis." EPA, again, declined to obey this Congressional mandate. It admitted in its purported four-part list and schedule, as follows:

> "[R]eactivity data on VOC, especially those compounds used to formulate consumer and commercial products, are extremely limited. Better data, which can be obtained only at great expense, are needed if the EPA is to consider relative photochemical reactivity in development of regulations."

Having failed to determine the potential of all VOC species to contribute to ozone, as required, having failed to consider reactivity or cost-effectiveness, as required, and having considered magnitude and efficiency, without authority to do so, it is no surprise that architectural coatings appeared on the first of the four rounds listed by EPA.

C. UNFUNDED MANDATES

Section 202 of the Unfunded Mandates Reform Act of 1995 provides, in key part, as follows:

> "...[B]efore promulgating any general notice of proposed rule making that is likely to result in promulgation of any rule that includes any Federal

> mandate that may result in the expenditure... by the private sector of $100,000,000 or more (adjusted annually for inflation) in any 1 year, ... the agency shall prepare a written statement containing .... a qualitative and quantitative assessment of the anticipated costs and benefits of the Federal mandate, including the costs and benefits to ... the private sector, as well as the effect of the Federal mandate on...the natural environment...;"

EPA's first response to this directive was the statement that its proposed VOC rule "contains no Federal mandates for . . . the private sector. This is nonsense, as the proposed rule would mandate that manufacturers "shall limit the VOC content" of each coating.

EPA's preamble also claims that "[i]n any event, EPA has determined that this rule does not contain a Federal mandate that may result in expenditures of $100 million or more for . . . the private sector in any one year."[8]

EPA's calculation of the potential costs of its proposed rule is severely flawed in several respects. For example, EPA ignored the costs of the *de facto* substitutions caused by phase one of the rule. Due to the massive costs and impossibly short time frame for compliance many newly-regulated manufacturers will be unable to reformulate their noncomplying products. The practical result is a withdrawal by those manufacturers of many of their products.

With respect to the costs EPA did analyze, its results are significantly underestimated and not consistent with actual experience. For example, one small manufacturer has spent $1 million in seven years to reformulate 15% of its product line. Multiplying this cost across the full product line of hundreds of small companies alone results in expenditures far in excess of the trigger amount. Additionally, even if a mere handful of

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[8] Executive Order No. 12866 requires all regulatory action determined by an agency to be "significant" to undergo cost-benefit assessment and be reviewed by the Office of Management and Budget. EPA acknowledges that the proposed rule is significant pursuant to a subsection of the order requiring a basic assessment of the costs and benefits. EPA, however, failed to properly perform the basis analysis. EPA also failed to acknowledge its obligation to provide OMB with additional analytical information due to the proposed rule's annual effect of the economy of $100 million. Nevertheless, OMB cleared the proposed rule on June 4, 1996.

small companies go broke, a scenario that is very likely to occur, their aggregate market value destroyed would be well in excess of $100 million.

EPA also ignored the costs of the mandated substitutions that may occur in phase two of its regulation that threatens "more stringent VOC requirements in the future."

EPA also failed to calculate the costs borne by retailers, contractors, workers, and consumers.

In short, the proposed rule "may" result in costs exceeding the trigger amount. An UMRA cost-benefit assessment should have been prepared by EPA.

VI. SMALL BUSINESS REVIEW FAILURES

The focus of the Committee's current inquiry is EPA's implementation of the RFA, as strengthened by SBREFA. As to architectural coatings, EPA's pattern of noncompliance continues.

Even before the enactment and effectiveness of Subtitle D of SBREFA, the RFA imposed significant requirements on EPA with respect to its proposed architectural coating rule under CAA Section 183(e). The RFA requires EPA to prepare an initial regulatory flexibility analysis. It mandates that EPA publish at least a summary thereof. And it requires that EPA assure small business participation in the rulemaking.

Subtitle D of SBREFA adds significant requirements to the RFA. It requires that EPA, OMB, and the SBA shall, after consulting with small business representatives, review their concerns, publish a report, and, if appropriate, modify the initial analysis or the proposed rule. It also requires that EPA designate a small business advocacy chairperson and that he implement the review process.

As shown in the following five subsections, it is my opinion that EPA, when given certain mandates, failed to perform them and, when given discretion, exercised it without protecting small business.

A. INITIAL REGULATORY FLEXIBILITY ANALYSIS

(1) Section 603

Section 603 of the RFA mandates that, before proposing a rule, EPA shall prepare an initial regulatory flexibility analysis. Among various other important subjects, the initial analysis shall describe the "impact" of the proposed rule on

small businesses. It must also contain a description of any significant "alternatives" to the proposal which would "minimize" that impact. The analysis of alternatives shall discuss "differing . . . timetables." The initial analysis shall also describe "reasons why action . . . is being considered."

(2) Omissions in First Two Drafts

EPA's March 1995 draft economic impact report about a proposed architectural coatings rule then being considered contained a 27-page section purporting to satisfy Section 603. Based in part on this draft report EPA prepared a September 21, 1995 draft of a preamble to that possible rule proposal.

My law firm wrote a letter to EPA, dated October 10, 1995, expressing the opinion, among other things, that as to Section 603 of the RFA, the draft initial analysis unlawfully failed to describe the impacts of the possible proposal on retail dealers and painting contractors. It also noted that impacts on many small paint manufacturers (those with more than $10 million in annual sales, but less than 500 employees) were not conducted.[9] It was also my firm's opinion that the draft grossly underestimated the costs to small manufacturers under the limits and deadlines then under consideration.

EPA's revised draft report, prepared in conjunction with a revised draft preamble, dated January 30, 1996, contained substantially the same section purporting to be an initial analysis under 603.

My law firm wrote a letter dated May 1, 1996 to OMB, with a copy to EPA, stating among other things that the revised draft initial analysis continued to omit any discussion of impacts on dealers, contractors, and many manufacturers. It further stated: "We think that the estimate of manufacturers' reformulation costs is seriously flawed and contradicted by EPA's own work. Even more flawed is EPA's treatment of the very substantial product removal or withdrawal costs, especially those which will be incurred under the proposed second phase of the rule."

On May 30, 1996 my law firm wrote to SBA stating that EPA's revised draft initial analysis "contain[ed] the same three crucial omissions" noted in our prior letters.

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[9] EPA's March 1995 draft initial analysis acknowledged that it did not use the definition required by Section 601(3) of the RFA and that, instead, it created its own definition "based on input from" the Reg-Neg.

At no time did EPA, OMB, or SBA respond to our critique of that draft of the initial analysis.

(3) Omissions in Third Draft

On June 25, 1996 EPA published in the Federal Register a notice of proposed rulemaking. It referred to the further revised report of June 1996 (still marked "DRAFT") sitting in the docket. A 28-page section of the further revised draft report apparently purports to be EPA's "initial regulatory flexibility analysis" within the meaning of Section 603 of the RFA. It contains the same errors and omissions as the two prior drafts.

EPA's purported initial regulatory flexibility analysis fails to describe the impact of the phase one *de facto* substitution limits on many small manufacturers, including those with more than $10 million of annual sales but less than 500 employees, and especially those with most of their operations outside of previously regulated areas.[10]

The initial analysis contains no discussion of differing timetables or other alternatives which would minimize the impact of the extremely short (six month) effective date of the phase one limits. Small manufacturers lack the time to test and the money to reformulate within the short time frame proposed.

Again, EPA's initial analysis totally ignores the impacts on tens of thousands of retail paint dealers and tens of thousands of painting contractors which would arise from the *de facto* substitution limits imposed on their suppliers. These impacts include reduced choices, higher costs, job failures, and a less competitive supplier market.

EPA's initial analysis also fails to describe the reasons why it is considering draconian substitution limits in phase two. If EPA makes such a formal threat, it should have done the homework essential to justify it. The stigma resulting from this irresponsible threat, alone, has a massive adverse impact on the market value of small manufacturers.

My law firm wrote EPA a letter, dated July 11, 1996, stating in pertinent part the following:

> " . . . Section 3 of the incomplete draft does not, as required, cover the effects of the proposed VOC

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[10] Mr. Richard Hardy, owner of XIM Products, Inc., will describe for the Committee the impacts that EPA should have described in its initial analysis.

limits (let alone any lower limits being considered for possible subsequent adoption) on (a) contractors with annual sales below $7 million, (b) retailers with annual sales below $5 million, nor (c) manufacturers having annual sales above $10 million but less than 500 employees, as required by the RFA and the small business provisions incorporated therein. We are of the opinion that the incomplete draft found in the docket on June 28 did not constitute an 'initial regulatory flexibility analysis,' as required by Section 603(a)."

B. ADVOCACY CHAIRPERSON

(1) Designation

Under Section 244(b) of Subtitle D of SBREFA, EPA was bound to "designate a small business advocacy chairperson" to implement the comprehensive tripartite review panel process set out in new Section 609(b), added to the RFA by SBREFA, to help produce better initial analyses and better rules. Section 244(b) mandates that EPA was to have made the designation of the small business advocacy chairperson "[n]ot later than" April 28, 1996.

In our letter of June 10, 1996 to SBA (with copies to EPA and OMB) we asked whether EPA had complied with this mandate and, if so, who it had designated as the small business advocacy chairperson.

On July 3, 1996 SBA faxed us a copy of a June 11, 1996 EPA memorandum stating that EPA designated one of its staff members to serve in that capacity. I understand that the designation occurred on or just prior to that date.

EPA apparently designated its small business advocacy chairperson approximately 10 weeks after SBREFA was enacted and approximately six weeks after the April 28 deadline fixed in Section 244(b). This period of delay, of course, was concurrent with a crucial period during which the effects of the architectural coatings rule then under consideration, especially its admitted adverse impacts on small businesses, required careful analysis.

(2) Responsibility

Section 244(b) of SBREFA also mandates that EPA's small business advocacy chairperson shall "be responsible for implementing" the new Section 609(b) review panel process.

Our June 10 letter to SBA (with copies to EPA and OMB) also asked for information about what the designated small business advocacy chairperson, if any, had done, if anything, to fulfill his or her statutory responsibility to implement the review panel process, as applied to the architectural coatings matter.

I repeated this question of an SBA official during a July 3, 1996 telephone conversation. He advised me EPA's small business advocacy chairperson had taken no steps since his designation to fulfill this statutory responsibility. He confirmed this in writing on July 19, 1996.

The paint rule which EPA was considering for publication in June obviously cried out for the kind of advocacy Congress had mandated on the part of the small business advocacy chairperson. He could and should have done his best to persuade EPA to utilize the new review panel process, to complete the initial analysis, and to modify the proposed rule.

C. REVIEW PANEL PROCESS

(1) Section 609(b)

Subtitle D of SBREFA added new Section 609(b) to the RFA, effective June 28, 1996. The review panel process created thereby has six main features.

Section 609(b)(1) mandates that EPA "shall... provide" SBA with "information on the potential impacts of the proposed rule on small entities." This did not happen here.

Section 609(b)(2) provides that within 15 days of SBA's "receipt" of the required information, SBA "shall identify individual representatives of affected small entities." This did not happen either.

Section 609(b)(3) mandates that EPA "shall convene a review panel" of EPA, OMB, and SBA officials. Of course, this too did not occur.

Section 609(b)(4) requires that the panel "shall review" material prepared by EPA and "shall... collect advice and recommendations" of each identified representative about the initial analysis. No such review occurred.

Section 609(b)(5) mandates that within 60 days after EPA convenes the panel, the panel "shall report" on the representatives' comments and the panel's findings thereon as a part of the rulemaking record. No such report was written.

New Section 609(b)(6) mandates that, where appropriate, EPA "shall modify" the initial analysis or the proposed rule. No such modifications were made in the paint situation.

(2) Demand for Compliance

By May 22, 1996 it was my impression that EPA was considering whether or not to utilize the new review panel process in connection with its paint rule. Thereafter, it became apparent that EPA had decided not to do so. My law firm wrote a letter, dated June 10, 1996, to SBA (with copies to EPA and OMB) stating as follows:

> "We have . . . been reliably informed that EPA is now attempting to get ready for publication in the Federal Register its proposed rule and an incomplete version of the initial regulatory flexibility analysis under Section 603 of the RFA before June 28, 1996, the date it contends that Subtitle D [SBREFA] (enacted March 29, 1996) will become effective. As you know, Subtitle D of SBREFA . . . adds the EPA-OMB-SBA small business impact review process of new RFA Section 609(b). Again, this apparent rush-to-judgment is of particular concern to us, especially since EPA has given us no response to various points made . . ., including points relating to . . . noncompliance with the RFA. . . .
>
> "In view of the importance, and the precedent-setting nature, of EPA's proposed architectural coatings rule, we question whether the Administration has adequately assessed the legal or policy bases for such precipitous action."

(3) Timing Decision

I do not read minds. More than one person may have been involved in the decision to publish the preamble three days before the SBREFA effective date. Decision-makers often have mixed motives.

But it seems to me that, based upon all the facts as I know them, the inference is warranted -- if not compelled -- that EPA deliberately decided not to expose the paint rule to the new process. In my opinion, that decision did not serve the interests of small business, nor the public interest.

D. PUBLICATION FAILURES

(1) The Initial Analysis

Under Section 603 of the RFA the initial regulatory flexibility analysis "or a summary thereof" shall be published in the Federal Register.

EPA elected not to publish the document it contends is the initial analysis itself. It states in the preamble that, instead, that draft report "is included in the public docket."

EPA apparently claims that one or more passages in the preamble constitute a "summary" thereof sufficient to meet the requirement of Section 603(a). We do not believe that such a claim can properly be made. Among other things, the brief discussion of small business impacts in the published preamble omitted to disclose or analyze the significance of the fact that coatings made by small manufacturers have a higher VOC content than the industry average. This is one of the two primary sources of small business impacts EPA, itself, identifies in the summary within the purported initial analysis.

Thus, in my opinion, a summary of any initial regulatory flexibility analysis was not published in the Federal Register before the effective date. Accordingly, it appears to me that Section 609(b) became effective prior to any complying publication for this reason, as well as the reason discussed above, and the reason discussed below.

(2) The Regulation

Section 603 of the RFA contemplates preparation of an initial regulatory flexibility analysis whenever EPA published a notice of proposed rulemaking as required by Section 553 of the Administrative Procedure Act.

EPA elected not to publish the text of its proposed architectural coatings rule its notice. Instead, it published the preamble.

EPA may claim that it published "the terms or substance" of the phase one rule and "a description of the subjects and issues involved" in the possible phase two limits. I disagree.

First, the preamble omits key terms found in the rule text, including the definitions of the categories subject to the limits. These definitions go to the very substance of the rule.

Second, EPA's threat to consider draconian substitution limits in a possible phase two does not describe either the subjects or the issues involved in such threatened regulation.

E. SMALL BUSINESS PARTICIPATION

(1) Section 609(a)

Section 609(a) of the RFA, as amended by SBREFA, mandates that EPA shall "assure" that impacted small businesses have been given an "opportunity to participate" in the rulemaking through the "reasonable use" of techniques such as "direct notification" of interested small businesses.

(2) Contractors and Dealers

It is my understanding that EPA has given no direct notification to painting contractors or retail dealers about its proposed rule. Nor am I aware of any other steps taken by EPA to assure that such impacted small businesses have an opportunity to participate.

(3) Small Manufacturers

EPA sent a letter dated July 3, 1996, along with a fact sheet, to a number of small manufacturers informing them of the rule proposal and the July 30, 1996 public hearing and soliciting comments.

The letter and attachment contain, in my opinion, a number of inaccurate statements. Those relating to the small business issues discussed above include the following:

(a) Phase one would impose "reformulation limits." In fact, the quick effective date turns many of the limits into *de facto* substitution limits for many manufacturers.

(b) The regulation would affect "manufacturers." In fact, it would also affect contractors and dealers.

(c) A copy of the proposed rule was "published" in the Federal Register. It was not.

(d) EPA has "worked closely with" industry members and has held "hundreds of discussions" with them. Outreach to adversely impacted small businesses is a desirable thing. But it is no substitute for compliance with Congressional

mandates, and it is no cure for past failures to comply.

VII. CONSEQUENCES OF EPA FAILURES

The above five failures by EPA to carry out mandates, or to perform acts within its discretion, have been extremely harmful. This is for at least four reasons.

A. MISSED OPPORTUNITIES

For many years, EPA has missed numerous opportunities to think seriously about the small business impacts of regulating paint.

In particular, EPA could and should have studied these impacts in doing its Section 183(e) study, but did not do so.

Again, EPA should have done, but did not do, this analysis in a cost-benefit study under UMRA, or Executive Order No. 12866, or both.

Having failed to meet these statutory requisites, the RFA, as amended by SBREFA, afforded EPA an excellent opportunity to make up for its earlier defaults. Unfortunately, it once again elected to forego the required study.

B. EXTENDED DEADLINE

EPA proposes that small manufacturers reformulate their products to meet the phase one limits within about six months of promulgation. Had EPA taken the above five steps, it would have been forced to come to grips with the phenomenon of *de facto* substitution, and it would likely have proposed, instead, an effective date several years after the date of promulgation.

C. THREATENED BANS

In addition to the *de facto* substitutions produced by the proposed rule, EPA also threatens to impose "more stringent VOC levels" at an unspecified future date. These lower levels could result in massive product bans. Therefore, they place an immediate stigma on a significant number of products produced by small manufacturers. A properly performed analysis of the impacts of this phase two of regulation would have demonstrated the absolute fallacy of EPA's reasoning. The product bans phase two would create have been shown to be both economically and environmentally counterproductive.

D. FINAL ANALYSIS

The benefits of the final regulatory analysis required by Section 604 of the RFA, as amended by SBREFA, are completely undermined if, as here, the initial analysis is riddled with mistakes and omissions. The initial analysis provides the foundation upon which the final analysis rests. Errors in the initial analysis cannot be undone in the second step. Instead, what results is no more than an analytical house of cards which cannot stand.

VIII. CONCLUSION

SBREFA's amendments to the RFA are very promising.

EPA's proposed architectural coatings rule was a perfect candidate for review thereunder.

Full compliance with the RFA, as amended by SBREFA, in this case would have set an excellent precedent.

I regret -- and I respectfully submit that all Americans should regret -- that EPA chose not to follow the mandates of Congress and to otherwise exercise its discretion in favor of small business protection.

Chairman BOND. Be pleased to have Mr. Hardy's testimony.

STATEMENT OF RICHARD HARDY, PRESIDENT, XIM PRODUCTS, INC., WESTLAKE, OHIO

Mr. HARDY. Thank you, Mr. Chairman, for the opportunity. My name is Richard Hardy. I am president and owner of XIM Products. It is a small specialty paint company located in the Cleveland, Ohio, area.

XIM sells all of its products nationally, and in some areas of the country we are regulated by VOC content of our paint. We therefore have experience with VOC regulations. Through reformulations XIM's product line is now 15 percent low VOC. The bad news is that we are still 85 percent at risk of being outlawed by the EPA's Phase I VOC reductions. Some reformulating can be done, and some cannot—forcing some of our products off the market. This affects XIM and those selling and applying our products.

More disastrous will be EPA's Phase II restrictions. I also feel that EPA should have studied the impact on this since they are threatening outright bans.

In the EPA's Initial Regulatory Flexibility Analysis, their data is based on sampling and averaged information from paint companies. These methods, however, exclude over 400 small paint businesses and the people selling and applying these coatings. In some cases, no small businesses or their products are averaged into the calculations. The EPA small business advocacy chairperson could have recognized this and helped, but he has not. The Three Agency Review Process should have uncovered this but has not.

The EPA ends up with low cost estimates to reformulate and a misleading impact on the industry. The EPA estimated in that study $17,700 to reformulate a product. It has been our experience it is in excess of $80,000. The EPA estimates reformulating costs as a percent of sales are at most only 3 percent. But they neglect the fact that the reformulated products will cost more. In our experience, 10 to 15 percent more, and this cannot be fully passed on to the customers. Therefore, small businesses get averaged out of business by the EPA's calculations.

Our company is only 17 people. It is under $5 million in sales. But over the last 7 years XIM has incurred over $1 million in reformulating and related business disruption costs just to comply with the regulations of a few States. The EPA has greatly underestimated the negative effect of these regulations on all businesses, and especially on small businesses. They have ignored the additional impacts associated with Phase II.

Thank you.

Chairman BOND. Thank you very much, Mr. Hardy.

Ms. Mohler.

STATEMENT OF JEAN SMITH MOHLER, ASSISTANT COUNSEL, PETROLEUM MARKETERS ASSOCIATION OF AMERICA, ARLINGTON, VIRGINIA

Ms. MOHLER. Thank you, Mr. Chairman. My name is Jean Mohler and I am assistant counsel for the Petroleum Marketers Association of America. PMAA is a federation of 41 State and regional

trade groups representing over 10,000 independent petroleum marketers.

I appreciate the opportunity to testify before the Committee today regarding the implementation of SBREFA. PMAA's membership would like to take this opportunity to thank the Committee, specifically Chairman Bond and Senator Bumpers, for working together to pass this legislation which fosters a more cooperative, less intrusive environment among agencies and small businesses.

Today, I would like to comment on PMAA's perspective regarding agency compliance with the process and procedures dictated under SBREFA. Specifically, I want to turn your attention to a recent regulatory action by the Environmental Protection Agency which substantially burdens small business and does so because the agency did not follow the spirit of SBREFA.

On June 27, 1996, EPA published a proposed rule to expand the toxic emission reporting program to several new non-manufacturing industry sectors including petroleum bulk storage terminals. Although PMAA acknowledges the importance of the public's right to know about toxic chemicals, PMAA faults the administration for inappropriately moving the proposal forward on an expedited schedule through the Office of Management and Budget. Even though EPA has been considering the proposal for several years, PMAA finds it irregular and a possible cause for concern that OMB would only take 1 week to review a proposal that the agency itself estimates is going to cost the industry over $190 million in its first year of implementation.

In addition, recent conversations with staff at EPA have suggested that the proposed rule was hurried by the administration so that it would be exempt from some of the requirements that were established by SBREFA. While the proposed TRI expansion will be subject to economic review required by SBREFA, EPA did not have to convene a small business advocacy review panel to examine the proposal because the proposed rule was published 1 day before SBREFA's effective date.

PMAA believes OMB expedited its consideration of the TRI proposal to avoid consideration by the small business review panel required under SBREFA, and as a result the quality of the initial regulatory flexibility analysis suffered.

Industries subject to the TRI proposal are grouped by a standard industrial classification code number. While reviewing the initial regulatory flexibility analysis, PMAA became concerned with the description of SIC Code 5171, petroleum bulk terminals and stations.

In the analysis, EPA distinguished between bulk terminals and bulk plants. While almost 80 percent of PMAA's members own bulk plants, less than 5 percent own bulk terminals. EPA recognized that bulk plants should not be included in the rulemaking because these small facilities would be adversely affected at a disproportionately high rate. EPA did not recognize, however, that bulk plants are in fact grouped in the same SIC Code classification as bulk terminals.

In the flexibility analysis, the agency incorrectly classified bulk plants as a separate SIC Code number. As a result of this improper classification, bulk plants are inadvertently included in the TRI re-

porting requirements. Had EPA taken the time to convene a small business review panel, PMAA would have notified the panel that the impact analysis classified bulk plants under an incorrect SIC Code, and as a result has unintentionally included small marketers under the proposal.

If the rule becomes final in its current form, 78 percent of PMAA's members will be affected. Extending the reporting requirements to include bulk plants would not be technically or economically feasible for the small petroleum marketer. The average petroleum marketer sells only 9.5 million gallons of product per year. Nevertheless, as written, the proposed rule subjects marketers with small bulk plants to the identical TRI reporting requirements as bulk terminals with an annual throughput of 300 million gallons of product per year.

William Ferren of BBF Oil Company located in Pine Bluff, Arkansas, is an average PMAA marketer with an annual throughput of approximately 16 million gallons. Under current EPA tier two reporting requirements, Mr. Ferren already has to file 66 reports annually with 15 different reporting locations, identifying the fact that 22 gasoline stations do in fact store gasoline. To subject Mr. Ferren to additional intricate reporting requirements appears overly burdensome since the local community already knows that the gasoline station stores gasoline, and the local planning officials and fire marshals already know the locations of such facilities.

EPA estimates that the potential cost to the petroleum industry for reporting for the first year would be over $69 million. This figure, however, does not take into consideration the 7,000 additional bulk plants which were mistakenly classified under an incorrect SIC Code. Therefore, the potential cost associated with this regulation are even greater than anticipated by EPA.

Our association believes that SBREFA will foster better cooperation among all stakeholders in future regulatory actions. One of the purposes of SBREFA is to implement some of the recommendations of the 1995 White House Conference on Small Business. The White House Conference produced a consensus that small businesses should be included earlier and more effectively into the regulatory process. PMAA agrees. We believe that future compliance with the spirit of SBREFA will assure that agencies are considering the impact of their actions on small business.

Again, I appreciate the opportunity to be here and I will be happy to answer any questions.

[The prepared statement of Ms. Mohler follows:]

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TESTIMONY OF JEAN SMITH MOHLER
ASSISTANT COUNSEL
PETROLEUM MARKETERS ASSOCIATION OF AMERICA (PMAA)
BEFORE THE UNITED STATES SENATE COMMITTEE ON SMALL BUSINESS

Good afternoon, my name is Jean Mohler and I am Assistant Counsel for the Petroleum Marketers Association of America, (PMAA). PMAA is a federation of 41 state and regional trade groups representing more than 10,000 independent petroleum marketers across the country. Eighty-nine percent of PMAA's membership is comprised of small businessmen and women. Collectively, these marketers sell nearly half the gasoline, over sixty percent of the diesel fuel and approximately eighty-five percent of the home heating oil consumed in the United States annually.

I appreciate the opportunity to testify before the Senate Small Business Committee today concerning the implementation of the Small Business Regulatory Enforcement Fairness Act (SBREFA). Because many of PMAA's marketers face regulatory excesses every day, PMAA's membership would like to take this opportunity to thank the Committee and specifically, Chairman Bond and Senator Bumpers for working together to pass legislation which will foster a more cooperative, less threatening regulatory environment among agencies and small businesses.

PMAA believes that SBREFA provides an important framework to make federal regulators more accountable for their enforcement actions. However, today I would like to comment on PMAA's perspective regarding agency compliance with the process and procedures dictated under SBREFA. Specifically, I want to turn your attention to a recent regulatory action by the Environmental Protection Agency (EPA) which substantially burdens small business and does so because the agency did not follow the spirit of SBREFA.

First, I will explain why PMAA believes an EPA's proposed rule was expedited through the Office of Management and Budget (OMB) in order to escape some of the initial procedural requirements of SBREFA. Second, I will illustrate how the regulatory impact analysis performed by EPA suffered as a result of this expedition. Finally, I will state why petroleum marketers will be disproportionately burdened as a result of this regulatory action.

EPA's Expedited Rulemaking

On June 27, 1996, EPA published a proposed rule to expand the toxics emissions reporting program to several new non-manufacturing industry sectors including petroleum bulk storage terminals. Although PMAA acknowledges the importance of the public's right to know about toxic chemicals, PMAA faults the Administration for inappropriately moving the proposal forward on an expedited schedule through the Office of Management and Budget (OMB) in order to avoid some of the requirements mandated by SBREFA. Because EPA determined that this proposed rule represents a "significant regulatory action" the proposal was submitted to OMB, and was reviewed for only one week before being approved.

Last week I contacted several staff members at OMB in an effort to determine OMB's average regulatory review period. Although no one was able to provide me with an average, I was informed that one week is substantially less time than what is usually taken on such a proposal (with the exception of rules that need to be approved to meet statutory deadlines).

Even though EPA has been considering this proposal for several years, to PMAA it appears irregular and a possible cause for concern that OMB would take only one week to review a proposal that the agency estimates will cost one hundred and ninety million dollars in its first year of implementation.

In addition, recent conversations with staff at EPA have suggested that the proposed rule was hurried by the Administration so that it would be exempt from some of the requirements that were established by SBREFA. While the proposed Toxics Release Inventory (TRI) expansion will be subject to economic review required by SBREFA, EPA did not have to convene a small business advocacy review panel to examine the proposal because the proposed rule was published one day before SBREFA's effective date.

The Administration has made it clear that it would like to see the rule finalized by the end of the year, so that the newly included industries will begin reporting in 1997. The Administration also claims that it would not be completed in that time frame if the proposed rule was subject to an initial small business review panel. PMAA finds it ironic that the Administration would support regulatory reform initiatives including relief for small businesses while simultaneously rushing certain regulatory proposals in an effort to avoid compliance with SBREFA.

PMAA believes OMB expedited its consideration of the TRI proposed expansion to avoid consideration by the small business review panel required under SBREFA, and as a result, the quality of the initial regulatory flexibility analysis suffered.

EPA's Regulatory Impact Analysis of TRI Proposal

EPA has proposed expansion of the TRI reporting requirements to seven new non-manufacturing industry sectors including petroleum bulk stations. Industries subject to this proposal are grouped by their Standard Industrial Classification (SIC) Code number.

Pursuant to the Regulatory Flexibility Act (RFA), EPA has to consider whether a regulatory action will have a significant adverse economic impact on a substantial number of small businesses. Because the proposed rule was judged to have such an impact, EPA prepared an initial regulatory flexibility analysis (IRFA) as part of its economic analysis. While reviewing this IRFA, PMAA became concerned with the analysis of SIC Code 5171, *petroleum bulk stations and terminals.*

In the analysis, EPA distinguished between bulk terminals and bulk plants. (Bulk terminals are facilities that are generally larger and sell to other facilities in the wholesale chain. Bulk plants are typically much smaller and sell to retailers and end users.) While almost eighty percent of PMAA's marketers own bulk plants, less than five percent own bulk terminals. EPA recognized that bulk plants should not be included in the rulemaking because these small facilities would be adversely affected at a disproportionately high rate. According to the IRFA, "the annual throughput for bulk plants is not large enough to meet the 25,000-lb threshold" and therefore EPA is proposing only that bulk terminals (SIC Code 5171) report under TRI.

In the IRFA, however, the agency incorrectly classified bulk plants as SIC Code 5172. Bulk plants are in fact grouped in the same classification as bulk terminals, SIC Code 5171. As a result of this improper classification, bulk plants are inadvertently included in the TRI reporting requirements.

Had EPA taken the time to convene a small business review panel, PMAA would have notified the panel that the impact analysis classifies bulk plants under the incorrect SIC Code and as a result has unintentionally included small marketers under the proposal.

Since publication of the proposal, PMAA has met with EPA staff and discussed the classification problem. To the agency's credit, they acknowledged that they had intended to exclude marketers with small bulk plants. In addition, EPA admitted that it had incorrectly assumed bulk plants had a different SIC Code than bulk terminals. Last week, PMAA received verbal assurance that the agency will try to accommodate for this omission in the final rulemaking. Although PMAA always appreciates EPA's cooperation, we believe this misunderstanding could have been avoided if the agency had conducted a review panel. It is important to emphasize, moreover, that as currently written, the proposed rule poses a significant threat to small business petroleum marketers.

Impact on Petroleum Marketers

If the rule becomes final in its current form, seventy-eight percent of PMAA's members will be affected. Extending the reporting requirements to include bulk plants would not be technically or economically feasible for the small petroleum marketer. The majority of small marketers lack the technical expertise for such complicated and intricate reporting. PMAA members would find difficulty even determining whether they meet the threshold reporting requirements for TRI . Moreover, EPA has not published any guidelines to assist marketers in complying with the rule.

EPA has determined that bulk terminals with an average annual throughput of thirty-six million gallons or greater should be required to report on all TRI constituents of petroleum products. While owners of bulk terminals manage an annual throughput between thirty-six million and three hundred and sixty-five million gallons of product per year, only eight percent of PMAA's members sell over thirty million gallons.

In fact, the average petroleum marketer sells only nine and a half million gallons of product per year. Nevertheless, as written the proposed rule subjects marketers with small bulk plants to the identical TRI reporting requirements as bulk terminals with an annual throughput of three hundred million gallons of product.

For example, William Ferren of B-B-F Oil Company located in Pine Bluff, Arkansas is an average PMAA marketer with an annual throughput of approximately 10-16 million gallons. Under current EPA regulations, Mr. Ferren already has to file 66 reports annually with 15 different reporting locations identifying the fact that 22 gasoline outlets do, in fact, store gasoline. To subject Mr. Ferren to additional intricate reporting requirements appears overly burdensome since the local community already knows that the gasoline station stores gasoline and the local planning officials and fire marshals already know the locations of such facilities.

In addition to the technical TRI reporting requirements, there are also collateral regulatory requirements associated with the TRI Expansion. State and federal regulations link fees, pollution prevention and planning requirements to the requirement to file a TRI report; therefore, facilities that become subject to TRI reporting as a result of this rule may incur additional costs due to these new requirements.

EPA estimates that the potential costs to industry for reporting for the first year would be over sixty-nine million dollars. This figure, however, does not take into consideration the seven thousand additional bulk plants which were mistakenly classified as SIC Code 5172. Therefore, the potential costs associated with this regulation are even greater than anticipated by EPA.

PMAA will continue to work with EPA to assure that bulk plants are excluded under the final rule. We have already provided EPA with three possible solutions to correct the classification problem.

Our association believes that SBREFA will foster better cooperation among all stakeholders in future regulatory actions. One of the purposes of SBREFA is to implement some of the recommendations of the 1995 White House Conference on Small Business. The White House Conference produced a consensus that small businesses should be included earlier and more effectively into the regulatory process. PMAA agrees, and we believe that future compliance with the spirit of SBREFA will assure that agencies are considering the impact of their actions on small business. Again, I appreciate the opportunity to be here today, and I will be happy to answer any questions you may have.

Chairman BOND. Thank you very much for your testimony, Ms. Mohler.

At this point I would like to add to the record a letter of July 24, 1996, from Mr. G. Stephen Robins of the G.S. Robins Company of St. Louis, Missouri, as president-elect of the National Association of Chemical Distributors, which also raises questions about the TRI reporting requirements.

[The letter follows:]

126 Chouteau Ave. St. Louis, MO 63102
314-621-5155 FAX 314-621-1216

G. STEPHEN ROBINS
President

July 24, 1996

The Honorable Christopher Bond
Chairman
Senate Committee on Small Business
428A Russell Senate Office Building
Washington, DC 20510-6350

Dear Senator Bond:

As the owner of a small business in Missouri and the President-elect of the National Association of Chemical Distributors(NACD), I am writing in support of your holding an oversight hearing on the implementation of the Small Business Regulatory Enforcement Fairness Act of 1996 (SBREFA). In particular, I am especially concerned about the Environmental Protection Agency's issuance of a proposed rule only two days prior to the date SBREFA took effect. This proposed rule will have a devastating impact on my business and other NACD members.

The National Association of Chemical Distributors is an association of 315 chemical distributor companies that purchase chemicals from manufacturers and subsequently process, re-package, blend, warehouse, transport, and market these chemicals to an end user customer base of nearly 750,000. The typical chemical distributor facility is a small business that employs 15 people. In the state of Missouri there are approximately 45 chemical distribution facilities that employ 670 people.

Most of these companies will be severely affected by EPA's proposal to add seven industry sectors to the list of industries subject to Toxic Release Inventory reporting requirements. This rule, which will have an overall impact on the seven industries of $191.1 million in the first year, was issued on June 27, as mentioned previously, a mere two days before SBREFA took effect.

EPA issued this major rule in an overly expeditious fashion, and consequently, their data upon which this rule was based appears to be incomplete, if not inaccurate. EPA has not initiated any direct contact with the chemical distribution industry. Nevertheless, this rule, according to EPA's estimates, will cost chemical distributors $51.5 million in the first year and $33.5 million in following years. Based on EPA's estimate of 782 facilities in our industry which will bear this cost, each facility will face an average cost of nearly $66,000. Had EPA waited until SBREFA was implemented, a review panel would have had the opportunity to more fully examine this negative impact on small businesses.

NACD intends to request an extension of the comment period in order to collect data which EPA has overlooked and to evaluate the cost estimates that EPA has published. The prejudice facing NACD is magnified by the fact that the Association's members are predominantly small enterprises that lack the manpower and resources to evaluate EPA's rule on short notice. EPA's

failure to work with NACD as the rule was prepared, coupled with the brief comment period, appears to counter the steps that the Clinton Administration has taken to ensure that rulemaking agencies carefully consider the concerns of small business.

SBREFA is premised on the notion that "fundamental changes ... are needed in the regulatory and enforcement culture of Federal agencies to make agencies more responsive to small business ... without compromising the statutory missions of agencies."--SBREFA section 202 (3). Therefore, EPA's desire to conclude its rulemaking on an expedited basis should not be at the expense of small businesses such as the majority of NACD members.

Again, I appreciate your holding this oversight hearing on behalf of small businesses. I would be happy to provide additional information that would be helpful to you or the Committee as you continue your efforts on this issue.

Sincerely,

G. Stephen Robins

G. Stephen Robins
President

Chairman BOND. Now with that we turn to Mr. Goldsmith who was formerly with the Office of the Solicitor of the U.S. Department of Labor; an adjunct professor, Georgetown University Law Center; an associate editor of the legal textbook, Occupational Safety and Health Law. Thank you, Mr. Goldsmith.

STATEMENT OF WILLIS J. GOLDSMITH, PARTNER, JONES, DAY, REAVIS & POGUE, WASHINGTON, D.C.

Mr. GOLDSMITH. Thank you, Mr. Chairman. I thank you, as have the other members of the panel, for the opportunity to appear before you.

In my written comments I have summarized certain of the legal issues that arise from the interplay of SBREFA and the tendency of the Occupational Safety and Health Administration to regulate using guidelines, directives, policy letters, and the like. The most recent example of OSHA's regulating in this regard are the draft guidelines for workplace violence prevention programs for night retail establishments dated in April and June of this year.

What I would like to focus on first is, as a general matter, what does it mean to the small business community when OSHA regulates using guidelines as opposed to rulemaking, especially in the context of SBREFA? What it means when OSHA issues a guideline instead of a rule is that SBREFA is irrelevant. Because there is no proposed or final rule, there is no regulatory flexibility analysis. There is no judicial review. There is no small business advocacy review panel established. There is no congressional review of agency rulemaking because, as I noted, there are no rules.

Now whether SBREFA, or for that matter the Occupational Safety and Health Act, is undermined when OSHA regulates by issuing guidelines is not some arcane, inside-the-Beltway legal question. As a practical matter, on a day-to-day basis, guidelines such as OSHA's draft workplace violence guidelines often wind up having the force of law, especially in the context of an OSHA inspection of a small business.

I think in order to fully understand that it is important to understand what does not happen during the course of an OSHA inspection. When the compliance officer shows up at the company door and shows his badge and says that he or she is beginning an inspection of the workplace, the compliance officer does not say "part of my inspection will review the company's compliance with guidelines that were issued by the Department of Labor in Washington. But do not worry about that because as guidelines they are unenforceable under SBREFA and the OSHA Act because they were not properly promulgated." That does not happen.

What happens, even to very large businesses, is that the inspector says, "I am enforcing compliance with the law. This is the law." Now a small business owner, indeed many large business owners simply lack the resources or even the time to determine whether the compliance officer is actually trying to enforce a guideline, a directive, a standard, a regulation, a CPL, or whatever. All the person knows is that there is a Government agent at the door and that Government agent is there to enforce his or her view of the law.

Now when this happens small business owners lose out in two very real and significant ways. First of all, they have had absolutely no input, much less meaningful input, into the content of the guidelines. There is no system for doing that. There is a system of sorts that OSHA has developed, but I think that how that system functions is probably not a topic for this Committee so I will not go into it in detail.

Second, they are then subject to being pressured into trying to comply with those guidelines, however vague and otherwise unenforceable they might actually be. Now OSHA's 28-page draft workplace violence guidelines are a good example of the problems created by this informal, ad hoc regulatory approach.

Just to give you a couple of points from them, and not at all to impugn the purpose underlying them, but the guidelines state that they are not a standard or a regulation. But then they go on to say that those in compliance with the guidelines will not be subject to prosecution under the act's General Duty Clause, thereby suggesting that those employers that are not in compliance may be cited.

Compliance with the guidelines is not likely to be easy, especially for small business. The guidelines say any number of things in those 28 pages that are vague and therefore complex and difficult to apply. Indeed, like the OSHA meatpacking guidelines for ergonomic hazards, there is much more ambiguity, and therefore, complexity in the workplace violence guidelines than first meets the eye.

To sum up, Mr. Chairman, by issuing guidelines OSHA simply trumps SBREFA. SBREFA is designed to accomplish a number of objectives. All of those objectives turn on an agency's promulgation of a rule either through the APA or some other statutory rulemaking procedure. When OSHA publishes guidelines that are not rules, and especially when they are enforced as rules, the agency ignores the letter and spirit of SBREFA. Surely, this could not have been the intent of Congress in passing SBREFA.

Thank you, and I will be happy to answer any questions the chairman might have.

[The prepared statement of Mr. Goldsmith follows:]

WILLIS J. GOLDSMITH, PARTNER
JONES, DAY, REAVIS & POGUE
WASHINGTON, D.C.

Good afternoon Mr. Chairman and Members of the Committee. My name is Willis Goldsmith. I am a partner in the firm of Jones, Day, Reavis & Pogue, an international law firm of approximately 1,000 lawyers in 20 offices around the world, and Chair of the firm's Labor and Employment Law Practice.

Thank you for the opportunity to discuss the implementation of the Small Business Regulatory Enforcement Fairness Act of 1996 ("SBREFA"). My comments today will focus on how the Occupational Safety and Health Administration ("OSHA") is likely to respond to this important new legislation in light of that Agency's long history of using informal guidelines and directives as part of its regulatory and enforcement policy.

For nearly twenty-five years, I have advised employers regarding their obligations under the Occupational Safety and Health Act ("OSH Act" or "Act"), 29 U.S.C. §§ 651-678 (1994), and litigated cases under the statute. In addition, I have often written and lectured on the Act and related topics, including serving as one of four Associate Editors of Occupational Safety and Health Law, (Bureau of National Affairs, 1988), a treatise on the OSH Act prepared by the Labor and Employment Law Section of the American Bar Association through its Committee on Occupational Safety and Health, and teaching a course on the law of occupational safety and health as an Adjunct Professor in the Graduate Program at the Georgetown University Law Center. My experience has, I believe, provided me with insight as to how OSHA directives -- including standards, guidelines, and regulations -- are understood and applied both by Agency personnel and by employers.

It should first be noted that the OSH Act applies to any person "engaged in a business affecting commerce who has employees." 29 U.S.C.A. § 652(5) (1994). This extremely broad scope of coverage makes the Act's workplace requirements applicable to most small businesses covered by SBREFA. See Pub. L. No. 104-121 § 211(1).

The OSH Act provides two basic enforcement mechanisms by which OSHA implements its mandate to attempt to ensure workplace safety and health. The primary method gives OSHA the power to promulgate and enforce specific health and safety standards. In promulgating standards, OSHA employs a hybrid form of rulemaking -- a system set forth in the OSH Act itself that is similar, but not identical, to notice and comment rulemaking under the Administrative Procedure Act ("APA"). Standards promulgated under the rulemaking provisions of the OSH Act would clearly be

rules subject to the provisions affording regulatory input, protection, and redress to small businesses under SBREFA. See e.g., SBREFA § 241 (Regulatory Flexibility Analysis), § 242 (Judicial Review), § 244 (Small Business Advocacy Review Panels), and § 251 (Congressional Review of Agency Rulemaking).

The OSH Act also allows OSHA to prosecute employers under Section 5(a)(1) of the Act, the so-called "General Duty Clause," 29 U.S.C. § 654(a)(1) (1994), whenever the Agency believes that a workplace condition not covered by a specific standard constitutes a "recognized hazard" that is "causing or [is] likely to cause death or serious physical harm" as long as there are feasible means to abate the condition. The legislative history of the OSH Act, repeatedly cited by the Courts of Appeals, makes it clear that Congress intended the General Duty Clause to be used only infrequently; that is, only where there are unique or special workplace conditions not covered by a specific standard.

In the past decade, OSHA has developed a number of policies and procedures that, for all practical purposes, have the effect of standards but have been put in place without the Agency having engaged in the rulemaking required by the OSH Act. The most recent example is OSHA's draft "Guidelines for Workplace Violence Prevention for Night Retail Establishments," Dept. of Labor/OSHA (Apr. 5, 1996, revised June 28, 1996) ("Workplace Violence Guidelines"), last revised less than a month ago and which may be subject to SBREFA. The Workplace Violence Guidelines are designed to reduce the high incidence of armed robbery and other violence perpetrated against employees of late-night retail shops, bars, gas stations, and the like. This is, without question, an important and laudable objective. The means by which the Agency seeks to accomplish its goal, however, is troublesome, especially when measured against the purposes and requirements of SBREFA.

First, from a substantive perspective, because OSHA has published the Workplace Violence Guidelines as "Guidelines" rather than a proposed standard, the Agency circumvented the OSH Act's rulemaking requirements. As a result, the Guidelines have not been developed and refined through the statute's rulemaking process; this may explain, in part, why they are extremely vague and provide generally inadequate guidance for private sector compliance. More importantly for the purposes of this Committee, publishing a "Guideline," rather than e.g., a proposed standard or a final rule, makes SBREFA a non-issue: absent a formally proposed rule, SBREFA's provisions are never triggered.

Presumably to deflect criticism for the manner in which the Workplace Violence Guidelines were developed, the Agency emphasizes that they "are not a new standard or regulation," thereby implying that they do not have the force of law. See Guidelines for Workplace Violence at p. i (emphasis in original). But the Guidelines go on to send a quite different message:

> Employers can be cited for violating the General Duty Clause if there is a recognized hazard of workplace violence in their establishments and they do nothing to prevent or abate it. Failure to implement these guidelines is not in itself a violation of the General Duty Clause of the OSH Act. OSHA will not cite employers who have effectively implemented these guidelines.

Id. at i-ii. But will OSHA use the General Duty Clause to cite employers who have not "effectively" implemented the Workplace Violence Guidelines? Nobody knows. That fact, no less than the fact that the Agency takes SBREFA completely out of the picture when it issues "guidelines" instead of final rules, should be of concern to this Committee and the small business community. This is so irrespective of whether the Workplace Violence Guidelines in particular would be subject to SBREFA if properly promulgated as a final rule. If OSHA chooses to use guidelines instead of properly promulgated standards to set enforcement policy, the Agency should, at a minimum, expressly state that such guidelines cannot and will not be enforced as standards or under the General Duty Clause.

The absence of any enforcement disclaimer in the Workplace Violence Guidelines is particularly problematic given OSHA's history of ignoring its own statute to accomplish objectives the Agency deems important. A few examples of OSHA's record in this regard highlight this point.

OSHA's Ergonomics Enforcement Program

Since the mid-1980s, OSHA has cited hundreds of employers for General Duty Clause violations because of the presence of supposed workplace "ergonomic hazards." Ergonomic hazards have been alleged to result from such activities as standing, walking and, in a nursing home, lifting patients. OSHA has long believed that exposure to these hazards can lead to the development of "repetitive stress injuries" or "cumulative trauma disorders." OSHA's ergonomic hazard enforcement policy has resulted in substantial economic penalties and enormous abatement costs for employers in a wide range of industries, and for businesses of every size. Yet it was not until August of 1992 that OSHA took even the most preliminary steps toward promulgating a standard on what it apparently believes is a serious workplace concern; since that time, OSHA has continued to use the General Duty Clause to create policy -- one case or one economically coerced settlement at a time. See Advance Notice of Proposed Rulemaking, 57 Fed. Reg. 34192 (Aug. 3, 1992).

As with the Workplace Violence Guidelines, OSHA's "enforcement authority" for its ergonomics policy purportedly comes from the General Duty Clause. As noted above, however, use of the General Duty Clause is not, and was never meant to be, a

substitute for the promulgation of a standard:

> The general duty clause in this bill would not be a general substitute for reliance on standards, but would simply enable the Secretary to insure the protection of employees who are working under special circumstances for which no standard has yet been adopted.

Senate Report No. 1282, 91st Cong., 2d Sess. 10 (1970).

> It is also clear that the general duty requirement should not be used to set ad hoc standards. The bill already provides procedures for establishing temporary emergency standards. It is expected that the general duty requirement will be relied upon infrequently and that primary reliance will be placed on specific standards which will be promulgated under the Act.

Statement of Rep. Steiger, reprinted in Senate Comm. on Labor & Public Welfare, 92d Cong., 1st Sess., Legislative History of the Occupational Safety and Health Act of 1970 1217 (Comm. Print 1971).

Furthermore, the General Duty Clause was never intended to cover such universal exposures as walking and standing or, for that matter, living in a society where working in a gas station during the evening unfortunately carries with it the real threat of involvement in violent crime. The General Duty Clause was intended only for application to "unique" situations:

> [the general duty] clause enables the Federal Government to provide for the protection of employees who are working under such unique circumstances that no standard has yet been enacted . . . .

H.R. Rep. No. 1291, 91st Cong., 1st Sess. 851-52, reprinted in Staff of Senate Comm. on Labor and Public Welfare, 92d Cong., 1st Sess., Legislative History of the Occupational Safety and Health Act of 1970 (Comm. Print 1971) (emphasis in original). Senator Williams, in the Report of the Senate Committee on Labor and Public Welfare, agreed:

> [t]he general duty clause in this bill would not be a substitute for reliance on standards, but would simply enable the Secretary to insure the protection of employees who are working under special circumstances for which no standard has yet been adopted.

S. Rep. No. 1282, 91st Cong., 1st Sess. 150, reprinted id. (emphasis added).

The federal courts have long acknowledged this legislative history and have emphasized that OSHA should enforce the Act through specific standards rather than by resorting to the

General Duty Clause. In B & B Insulation, Inc. v. OSHRC, 583 F.2d 1364 (5th Cir. 1978), for example, the court observed that "the Act indicates that Congress thought specificity of standards desirable" and emphasized the importance of input from all members of an industry when developing such standards. Id. at 1371-72; see also R.L. Sanders Roofing Co. v. OSHRC, 620 F.2d 97, 101 (5th Cir. 1980) (safety concerns should be addressed by promulgating standards rather than imposing liability on employers under the General Duty Clause); Brennan v. OSHRC, 513 F.2d 1032, 1038 (2nd Cir. 1975) (standards are "intended to be the primary method of achieving the policies of the Act").

Despite the clear legislative intent underlying the General Duty Clause, OSHA persists in using it as a method to enforce supposed informal policies -- such as those set forth in the Workplace Violence Guidelines -- that are developed without the benefits of rulemaking. As a result, not only are affected parties closed out of the process of developing standards that govern their workplaces -- a major objective of both the OSH Act and of SBREFA -- but, in addition, employers face the threat of complex and thus costly litigation turning on such inherently vague notions as the definition of a "recognized hazard." Regulating by way of the General Duty Clause, as OSHA apparently intends to do with its Workplace Violence Guidelines, imposes a particular burden on small businesses which, unlike larger employers, lack the resources -- and often even the time -- to defend themselves against the federal government.

OSHA's "Egregious" Penalty Policy

Another OSHA policy that has never been legitimized by way of any formal rulemaking process is the Agency's so-called "egregious" penalty policy. Under this policy, unilaterally initiated by the Agency in OSHA Instruction CPL 2.80 in October 1990, OSHA multiplies a proposed penalty on a per-employee basis when citing employers for certain willful violations of the Act. Agency use of this enforcement technique ostensibly is reserved for use only where OSHA feels that more of a deterrent is necessary. Thus, egregious or multiplied penalties may be imposed on employers that commit OSHA violations classified as "willful" and which satisfy at least one of five additional criteria. See CPL 2.80H(2)(b)(2-7) (examples of criteria include worker fatality, bad faith, and repeat violations). This practice has made egregious cases among the Agency's most prominent, and business's most costly. Application of the egregious policy to cases involving the General Duty Clause was set aside by the Occupational Safety and Health Review Commission in 1995, but the Secretary of Labor has sought review of the Commission's decision in the Fifth Circuit Court of Appeals.

In implementing the egregious policy, OSHA ignored the OSH Act altogether. Section 17(a) of the Act specifically sets forth the penalties for employers that engage in "willful" violations of the OSH Act. 29 U.S.C. § 666, amended by Omnibus Budget

Reconciliation Act of 1990, Pub. L. No. 101-508, § 3101 (1990). Civil penalties under Section 17(a) were once limited to not more than $10,000 for each violation. However, in response to claims that OSHA needed to be able to impose higher penalties to compel compliance with the Act, Congress in 1990 increased the penalties to a maximum of $70,000 per willful violation. While Congress recognized the need for increased penalties under the Act, it also provided clear limits on what those penalties should be -- from $5,000 to 70,000. Had Congress thought it necessary to provide for even higher penalties, presumably it would have done so. OSHA's unilaterally-implemented "egregious" penalty policy both circumvents the will of Congress and leaves businesses with no direction as to the maximum penalties that OSHA may impose from one day, or one employer, to the next.

OSHA's "Mandatory" Data-Gathering Survey

The most recently challenged example of OSHA's attempt to skirt the regulatory process concerns employers' recordkeeping duties. Since the 1970s, OSHA has required employers to record injuries and illnesses and to make these records available to OSHA compliance officers during an inspection. However, OSHA lacks a system to collect this information without an inspection. Therefore, OSHA decided to mail a detailed data-gathering survey to 80,000 employers with 60 or more employees asking them to submit a completed questionnaire. Whether employers' participation in the survey is mandatory has become a contested issue that currently is in litigation. See American Trucking Assoc., Inc. v. Secretary of Labor, No. 1:96-CV00552TPJ (D.D.C. filed Mar. 20, 1996).

According to the lawsuit filed by the American Trucking Association, OSHA lacks authority to conduct this data-gathering survey because the Agency has not promulgated the necessary standards under the OSH Act. Nevertheless, the survey warns employers that the OSH Act "requires you to complete this form" and that failure to "file this report as required may result in issuance of citations and assessment of penalties." Occupational Injury and Illness Report, 1995, U.S. Dept. of Labor (OSHA Form 196B (9/95)) p. 1-2. Indeed, in a February 1996 letter to Rep. Cass Ballenger (R-NC), Assistant Secretary of Labor Joseph A. Dear warned that while OSHA did not foresee widespread opposition to the survey, it could seek an administrative subpoena or conduct an on-site investigation in the case of a recalcitrant employer. See Daily Lab. Rep. (BNA), No. 133 (July 11, 1996). The Secretary's "comply or be punished" approach to this survey highlights OSHA's willingness to impose its will irrespective of the niceties involved in complying with its own statute, much less others.

OSHA's development and issuance of supposedly "informal" guidelines and internal policies has continued despite criticism from the federal courts. In one case, for example, OSHA sought to enforce a rule requiring employers to pay union officials who

participate in workplace inspections without publishing a notice of proposed rulemaking or allowing public comment before implementing a new rule. See Chamber of Commerce v. O.S.H.A., 636 F.2d 464, 470 (D.C. Cir. 1980). The D.C. Circuit vacated the rule, holding that it was legislative in nature and therefore subject to the notice and comment provisions of the APA. The court then criticized what it described as OSHA's "highhanded agency rulemaking:"

> The Assistant Secretary should not treat the procedural obligations under the APA as meaningless ritual. Parties affected by the proposed legislative rule are obvious beneficiaries of proper procedures . . . [g]iven the lack of supervision over agency decisionmaking that can result from judicial deference and congressional inattention . . . this protection, as a practical matter, may constitute an affected party's only defense mechanism.
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> . . . .
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> [F]ailure to seek at least the acquiescence of the governed eliminates a vital ingredient for effective administrative action. Charting changes in policy direction with the aid of those who will be affected . . . helps dispel suspicions of agency predisposition, unfairness, arrogance, improper influence, and ulterior motivation.

Id. at 470 (citations omitted). In addition to spelling out the importance of complying with the Act's rulemaking procedures, the Court reminded the Secretary that an Agency can derive significant advantages from the input that outside parties provide during the rulemaking process. Id.; see also, Usery v. Kennecott Copper Corp., 577 F.2d 1113, 1117-18 (10th Cir. 1977) (striking OSHA rule in which Agency changed the language of a regulation from advisory to mandatory without affording notice and comment); Synthetic Organic Chemical Mfrs. Ass'n v. Brennan, 506 F.2d 385 (3d Cir. 1974), cert. denied, 420 U.S. 973, rehearing denied, 423 U.S. 886 (1975) (striking rule that was published in substantially different form from the rule originally proposed).

CONCLUSION

If, as Shakespeare said, "What's past is prologue," The Tempest, act II, sc. i, 261, OSHA's past -- under both Democratic and Republican Administrations -- does not augur well for the Agency's compliance with SBREFA. OSHA's draft Workplace Violence Guidelines present an opportunity for this Committee to send the Agency at least two important messages. First, SBREFA -- no less than the OSH Act itself -- was designed, among other reasons, to provide affected parties with meaningful input into the regulatory process. It should not be effectively repealed by

agencies choosing to regulate using "guidelines" in lieu of final rules. Second, as a general matter, the rulemaking provisions of the OSH Act represent the legislative will of Congress; they are not obstacles to avoid but dictates to follow. To be sure, rulemaking under the OSH Act is a time-consuming and sometimes cumbersome process. Nevertheless, it is the law. If OSHA views its own rulemaking process as impractical or unworkable, the solution lies not in evading the OSH Act or SBREFA, but in seeking new or revised legislation.

Chairman BOND. Professor, thank you very much for the enlightening testimony. It takes me back to those wonderful days of law school. Would you say "expressio unius est exclusio alterius" means that if you will not get prosecuted if you do abide by the guidelines, that there is a very strong presumption that you may be prosecuted if you do not follow the guidelines?

Mr. GOLDSMITH. I would certainly agree with that, Mr. Chairman.

Chairman BOND. Now would it be possible under the same theory that OSHA uses that I could have skipped admin law altogether and just taken it as a guideline on my legal requirements? [Laughter.]

Mr. GOLDSMITH. That is a good question. I wish I had thought of that 25 years ago.

Chairman BOND. We are a little late in thinking of it. Seriously, this just seems to me to be such a clear-cut case of avoiding administrative procedure it is breathtaking in its simplicity. Can you give us any specific examples of where OSHA really has used these guidelines as a specific enforcement tool and ensured that its personnel carry out the policies?

Mr. GOLDSMITH. I think that probably the clearest example in recent years would focus on the ergonomics issue. OSHA has for 10 years identified ergonomics as a workplace hazard. It is a very complicated area, both legally and scientifically. I have just completed a 35-day trial focusing on that issue. I can attest to that personally of my own very recent experience.

It was not until 1992 that OSHA began the regulatory process, through rulemaking, by issuing a Notice of Proposed Rulemaking. And, of course, the question of what OSHA could do in the ergonomics area has been a subject of much debate in Congress up to and through just a month ago.

So, during that 10-year period, while there were many serious questions raised about the efficacy of regulating in the ergonomics area, OSHA has regulated that way. They have cited employers.

Chairman BOND. Under the General Duty Clause?

Mr. GOLDSMITH. Under the General Duty Clause. They have sought to impose very substantial penalties, and I think more importantly for small businesses, they have sought to and in many cases successfully imposed very serious and costly abatement programs, the usefulness of which the scientific community is now coming to the conclusion are very much open to question. So that is certainly one very recent example.

Another recent example has to do with the agency's egregious penalty program. This was a unilateral decision by the agency that was made in 1990. From my perspective, and I will try not to be too much of an advocate here, it has absolutely no basis in the statute. It is being challenged. Its use in General Duty Clause cases has been found to be inappropriate by the Occupational Safety and Health Review Commission. The Secretary of Labor has appealed that decision to the Fifth Circuit in a case called Arcadian. That is a program that, in effect, multiplies penalties under the General Duty Clause based on the number of employees who allegedly are exposed to a violative condition.

So, instead of doing what the statute says, which is to base a proposed penalty on a hazardous condition, the proposed penalty is based on the number of people who are allegedly exposed to the hazardous condition. So you go from one penalty to an infinite number of penalties, depending on how many employees there are in the workplace.

So those are two examples that come to mind right away, Mr. Chairman.

Chairman BOND. Thank you very much, Mr. Goldsmith. For the purposes of the staff here, I think I am going to send a letter to OSHA asking them to explain that particular activity and see if we can get a bit of a dialog started with them.

Ms. Mohler, going back to the TRI rule, it seems to be rushed to publication, at least from what you have told us. Can you explain briefly why you think this rule was rushed through and its consequences for the small businesses that you represent?

Ms. MOHLER. Sure. There were a lot of reasons. It is basically the sum of many factors why we feel that the rule was rushed.

The first thing that I already mentioned was that the TRI proposal was reviewed for 1 week. It has been PMAA's understanding that with an economic impact analysis that was 3½ inches thick that OMB would use close to its 90-day allotment to review such a proposal.

Chairman BOND. They got it done in a week?

Ms. MOHLER. In a week.

Chairman BOND. That is remarkable.

Ms. MOHLER. Very.

In addition, EPA estimates that it is supposed to cost the industry $190 million in its very first year of implementation. Just think, a week immediately glared out at us.

Second, I contacted several of the staff at OMB to try and find out what the average review period is, and although no one could give me a specific number of days that they usually review regulations, it was indicated that 1 week is substantially less than what is usually taken unless it is a regulation that has to be approved for some statutory requirements.

Also, the administration has made it clear that they want to see this rule finalized by the end of 1997 so that all of the new industries that are proposed will have to start reporting by then. If they had to conduct a small business review panel, it would not be done by 1997.

In addition, I think that is the reason why the comment period, I have been told, is not going to be extended.

The final reason, not only did they review it for a week, but they got it almost exactly a week before SBREFA's enactment date. So it was published the day before SBREFA took effect.

Because of this, 78 percent of our marketers will be affected by this. They are going to be subject to very intricate reporting requirements. Right now the majority of our members will not be able to even figure out if they are going to have to report.

In addition to falling into the classification code, you also have to have 10 full-time employees or more, and also you have to meet the reporting threshold which for one of the chemicals is at least 25,000 pounds manufactured or processed per year. They will not

be able to figure out if they process 25,000 pounds of X, Y, and Z, and EPA has not issued any guidelines for them at all. So right now, most of them are calling up wondering if they are going to have to comply or not.

The final thing, I think, too, is that a lot of them will have to go out of business because not only will they have to figure out this, what is called a Form R for TRI reporting, but there is also collateral requirements that are associated with this TRI list. Once you are on the list, you jump into a bunch of other requirements, State and Federal regulations link, fees, pollution prevention, planning requirements altogether.

I know, for example, there are stormwater permit requirements. Right now, marketers have to fill those out, but if they were on the TRI list, they would have to get at least an engineer to certify it which would cost an additional $1,000 and several other requirements. So this is going to have a huge impact on our marketers.

Chairman BOND. The workplace violence guidelines that Professor Goldsmith mentioned, would that have a practical effect on your members?

Ms. MOHLER. Yes, a very big effect. We have actually submitted comments.

Since we represent the small gas station owners, they come under night retail establishment. Many of them are open all night long. Most gas stations also have convenience stores attached with them. So it is going to affect almost all of our members.

Specifically, what is going to affect them is the voluntary guideline to have a two-clerk minimum at nighttime, and the National Association of Convenience Stores has estimated that that is going to cost the average marketer $18,000 additional a year.

The other problem with it, you had mentioned that they were very vague. We do not even know what is nighttime. I mean, what I am trying to figure out, is it 8 o'clock, 9 o'clock, 6 o'clock, because a lot of our members will just close early, but there is no time even mentioned there. So they do not even know what to do to prepare for that. So it is going to have a huge impact on our members.

Chairman BOND. Not to mention what it will do to the folks who live in Alaska.

Mr. Smiland, in your testimony, you noted that EPA published only the preamble to the paint and coatings rule prior to SBREFA's effective date, but not the rule itself. From your legal background, how do you view this partial release of information and the effect on the ability of the public comment process to go forward?

Mr. SMILAND. I think it was unfortunate to withhold the rule itself. It would have been easy to do. It is not very long.

The preamble does not describe or summarize the definitions to the rule itself, and without knowing the definitions, it is virtually impossible in many cases to know which limit governs a particular product.

Then, of course, I mentioned also the initial analysis or the purported initial analysis was not published either, but that the EPA opted, I suppose it would argue, to publish a summary, although that is highly dubious in my mind.

So you have the combination of neither the rule nor the analysis having been published. People who know how to dig them out on

the docket and other techniques can find it. But it is on an expedited basis, and I think it would have been very easy and very important to have done so.

Chairman BOND. You are from the Los Angeles area. California has had rules affecting the paint and coating industries for close to 20 years. Can you compare your regulatory experiences in California and give us any view of how the EPA present actions may compare?

Mr. SMILAND. Yes. My family business has been regulated, as I mentioned, for 19 years. These are very strict rules, not only the Los Angeles area board, but the Bay area board, and we have actually, I think, 30 districts out there that regulate these matters, and most of them or many of them regulate paint.

We currently have, I think, 150 master formulas, something in that order of magnitude, that we have had 19 years to reformulate. So we, more or less, after having been beat up for so long, this company, my company, will not have a problem with the first set of limits. But all of the other Smiland Paint Companies in the country, and there are hundreds of them, who have not been heavily regulated for a long period of time are going to have a great deal of difficulty.

We have also had four very unfortunate experiences with permanent paint bans. Four of our best products, we just do not make anymore because we cannot, because the limits are too low. We have also had on top of that additional experience with five other attempted bans that we set aside in court under California's mini-NEPA statute. But this is very serious business. It is not academic in any way. It affects these manufacturers who make these high-quality products.

The only way we can survive is to manufacture high-quality products at a reasonable price, with very good service. We do not advertise. We do not have our own retail outlets. We are not in any other business. A lot of these companies and their dealers who are even smaller businesses and the contractors who use their products are going to have a hard time.

Chairman BOND. What kind of impact is it going to have on jobs in small business?

Mr. SMILAND. About 500,000 people are employed in these small manufacturing companies and dealers and contracting firms. It is about the same level that I heard debated in the NAFTA thing.

Small businesses are labor-intensive relative to the large manufacturers. The impacts are very high, indeed.

Our company, for example, in 1987, when EPA forced the local districts to ban the general purpose enamels, to this day, we call that Black Friday. We had to let one-third of our very loyal, long-serving factory work force off. So jobs are at great peril, too.

Now, that is not part of SBREFA, but it certainly is part of the Unfunded Mandate Act, and it is part of the Clean Air Act provision authorizing this regulation. Incidently, EPA has not analyzed those impacts under those statutes either.

Chairman BOND. Mr. Hardy, we have had some very distinguished legal testimony on sort of the inside-the-beltway rulemaking process. It has been very informative, but you are president of a small paint company and perhaps you could give us more

of the flavor as you see it, as in your opening statement, as the impact of the proposed paint and coatings rule on your company and what you would expect should be reflected in an adequate Regulatory Flexibility analysis.

Mr. HARDY. I have been asked many times why don't you just reformulate your products, and as I mentioned earlier, the Regulatory Flexibility analysis pretty much averages out the industry so that it appears that there is not a major impact. It basically focuses on formulating, the technical process of formulating with a chemist.

What happens is not an easy matter. You do not just formulate specialty products one time. The formulation process goes on and on and on. In some cases, you continue to fine-tune these formulas over a number of years. In the cases that we have been familiar with already and the States that we sell and where we are regulated, it has been hundreds of reformulations. That is just the cost of reformulating.

Once you get the new product into the marketplace, a whole new set of costs come into play. In every case where we have introduced a reformulated product, we have experienced a loss in sales, and that is because the new products are different than the ones we were producing before. The users do not use them the same way, if they use them at all.

Consequently, the costs go way beyond just reformulating. They go into all aspects of business, marketing costs, business loss costs. In fact, that million-dollar number that I used is an actual tabulation.

In my estimation, if we have spent a million dollars in the last 7 years and we are a small company, the number has to be in the billions already, and the rule has not even gone into effect. I think it is going to be disastrous.

Chairman BOND. In other words, when you formulate a particular product, you are doing that for the marketplace to meet the needs of your customers, and when you change it to meet governmental standards, then that has a far greater impact. It is not a simple matter of changing a few things to meet the Government regulations. You have to go back to the original purpose which was to meet the demands of a customer.

Mr. HARDY. Some of these formulations in specialty product categories have grown in their status in the marker over many, many years, and they can be destroyed in the short period of time, as we are talking about, 6 months. You cannot get back there, it has been our experience. With a number of easy formulations you can, but for many small companies like XIM, we specialize in these very difficult formulations.

As an example, some of the solvent-based products contain as few as five or six raw materials. Some of the new higher-tech water-based products contain 25 or more raw materials, and they are very complex to formulate and to keep tinkering with to get the properties right.

Chairman BOND. Gentlemen and lady, thank you very much for being with us today. I will ask, if you do not mind, if my colleagues who may wish to submit questions for the record could contact you, we would appreciate very much if you could respond. You have

brought us some eye-opening testimony today, and we are very much concerned about what you have told us.

Thank you very much for taking the time, Mr. Smiland. I know you traveled a very long distance.

Mr. Hardy, my thanks to you as well.

Professor Goldsmith and Ms. Mohler, we sincerely appreciate your being with us.

The Committee will stand in adjournment.

[Whereupon, at 4:21 p.m., the Committee was adjourned.]

APPENDIX MATERIAL SUBMITTED

PREPARED STATEMENT OF SENATOR DALE BUMPERS, RANKING MEMBER
COMMITTEE ON SMALL BUSINESS
JULY 24, 1996

First, I want to commend Senator Bond for his leadership not only in arranging this morning's hearing, but even more for the realization of this important legislation. While this is an oversight hearing, it would be in order for this Committee to do some celebrating and self-congratulating over S. 942, which is now P.L. 104-121. S. 942 is truly one of the singular accomplishments of this Congress.

As for everyone here, judicial review of Regulatory Flexibility decisions was a bone in the throat of small businesses for over fifteen years. Small business owners were immensely gratified when the Reg Flex Act was signed by President Carter, but that law specifically precluded the ability of anyone to go into Federal court to enforce the statute's directions. This lack of enforceability hampered the effectiveness of Reg Flex throughout the 1980s and up until President Clinton signed S. 942 earlier this year. So, the importance of the accomplishment of Senator Bond and others who worked for the bill can hardly be overstated.

P.L. 104-121 is still brand new, and there may be some rough spots in it's implementation. However, this law represents the kind of positive change which the American people have spoken for in the last two elections. It marks a sea-change in the regulatory climate, and the Clinton Administration deserves the highest marks for embracing it. Frankly, it would have been no small task for any President to sign such a bill and keep peace and order in the Executive Branch. It is no secret that many major departments and agencies fought judicial review to a standstill all through the previous two Administrations. Had not the Vice President's National Performance Review agreed to take a completely fresh look at this issue in 1993, I dare say we would not be here today.

In that connection, the SBA Office of Advocacy deserves special mention, and not only because the Chief Counsel is here testifying. That Office not only kept the hope of reform alive, but one person in Advocacy was key in persuading the new Clinton Administration to take a stand in favor of judicial review. That person was Doris Freedman. She was Acting Chief Counsel for Advocacy at the beginning of this Administration. Doris worked for a time on special detail to this Committee, but for many years she was Advocacy's in-house expert on Reg Flex. When the present Administration began, she played a key role in persuading Erskine Bowles, Phil Lader, and others that judicial review of Reg Flex was a issue of primary importance to the small business sector. For that, she will always have my thanks.

Again, Mr. Chairman, I congratulate you on your fine leadership in bringing people together to review the implementation of this new law, and for your part in enacting this new Federal policy for small business owners. I also thank today's witnesses for taking time to be with us today, and I look forward to their testimony.

OPENING STATEMENT OF SENATOR LARRY PRESSLER
COMMITTEE ON SMALL BUSINESS
JULY 24, 1996

Thank you, Mr. Chairman. I simply want to reiterate the message of today's hearing, which is that this Congress is very serious about implementing the Small Business Regulatory Enforcement Act and the Regulatory Flexibility Act. Federal agencies have got to change their ways. Before taking any new action, federal agencies must take into account how their rules, regulations and policies impact on small businesses across the country. It is the responsibility of the White House to ensure that this message is clearly received by every federal regulator and bureaucrat, whether they work in the White House or in Shannon County, South Dakota.

So far, that has not happened. This Committee has contacted the five major regulatory agencies (IRS, EPA, OSHA, OMB and SBA) to inquire about their plans to implement the new law. The responses suggest that the agencies are not doing all they can to change the culture of the federal bureaucracy. That is not acceptable.

As we all know, our country's economic base depends on the success of small businesses. They are the engine that drives the world's greatest economy. The federal government has got to respect that fact and consider the impact its rules and regulations will have on small businesses before making those changes.

So I commend you, Chairman Bond, for holding this hearing and for keeping our focus on the need to protect small businesses. I look forward to hearing from the witnesses.

COMMENTS FOR THE RECORD

Collier, Shannon, Rill & Scott, PLLC
Attorneys-at-Law
3050 K Street, N.W.
Suite 400
Washington, D.C. 20007

Tel.: (202) 342-8400
Fax: (202) 342-8451

10 Barrack Street
Level 12
Sydney, NSW 2000, Australia
Tel 61-2-262-6700
Fax 61-2-262-3263

August 1, 1996

The Honorable Christopher (Kit) Bond
Chairman
Committee on Small Business
U.S. Senate
SR-428A Russell Senate Office Building
Washington, D.C. 20510

Re: **Small Business Regulatory Enforcement Fairness Act Implications For National Institute For Occupational Safety And Health Exposure Criteria Document**

Dear Senator Bond:

The Independent Lubricant Manufacturers Association ("ILMA") attended the Small Business Committee's oversight hearing last week on the "Small Business Regulatory Enforcement Fairness Act" ("SBREFA"). In particular, the Association was interested in the testimony of Willis J. Goldsmith regarding SBREFA's affect on the Occupational Safety and Health Administration ("OSHA") and its regulatory activities. ILMA similarly is concerned with how the National Institute for Occupational Safety and Health ("NIOSH") is implementing SBREFA, particularly with criteria documents, such as its draft "Criteria for a Recommended Standard: Occupational Exposures to Metalworking Fluids." OSHA has designated metal-working/machining fluids for priority rulemaking (and is considering SBREFA within this issue), and the NIOSH document, if finalized, will affect OSHA's efforts. Accordingly, ILMA submits the following comments for inclusion in the record of the July 24 hearing.

I. ILMA Background

ILMA, established in 1948, is a national trade association of 147 regular member companies, consisting largely of small businesses, ranging in size from fewer than 10 to more than 200 employees. As a group, ILMA member companies blend, compound and sell over 25 percent of the United States' lubricant needs and over 75 percent of the metal removal fluids utilized in the country.

A lubricant is a liquid or solid substance used to reduce the friction, heat and wear between solid surfaces. ILMA members manufacture automotive, truck, marine, aircraft and

industrial engine oils; transmission fluids; hydraulic fluids; greases; general industrial oils; power equipment oils; process oils; metal removal, treatment, protecting and forming lubricants; and rolling oils.

In order to manufacture a lubricant, ILMA member companies purchase oil and synthetic lubricant base stocks and a wide range of additives. ILMA member companies then compound and blend the base stocks with the correct additives in the proper proportions to produce a lubricant with the desired characteristics for a particular job.

ILMA members are diverse. A large proportion manufacture automotive lubricants for original equipment manufacturers and for the retail market, either under their own labels or through contract packaging arrangements. Many produce lubricants for metalworking and heavy industrial machines, while others supply lubricants for mining, textiles, food processing, electronics, as well as many other industries.

Independent lubricant manufacturers by definition are neither owned nor controlled by companies that explore for or refine crude oil to produce lubricant base stocks. Base oils are purchased from refiners, who are also competitors in the sale of finished products. Independent lubricant manufacturers succeed by manufacturing and marketing high-quality, often specialized, lubricants. Their success in this competitive market also is directly attributable to their tradition of providing excellent, individualized service to their customers.

II. NIOSH Recommended Exposure Limit Has Legal and Regulatory Impacts On Small Businesses

ILMA agrees with Mr. Goldsmith's testimony that OSHA "guidelines" have rulemaking-like effects on the regulated community and should be subject to SBREFA. However, ILMA would not limit SBREFA's provisions only to "rule-drafting" agencies. NIOSH is an advisory agency that recommends rulemaking activities to OSHA; however, its recommendations can have "rulemaking-like" impacts. NIOSH published a draft criteria document in February 1996, recommending a drastically reduced exposure limit to mists of metal removal fluids and proposing a workplace occupational safety and health program, including exposure and worker medical monitoring. NIOSH originally had proposed a "hazard review" for metal removal fluids.

ILMA fully supports proactive precautions that protect the health and safety of workers that are exposed to metal removal fluids. Historically, the Association's members have been at the forefront of product reformulation and new product research and development in order to prevent health and safety concerns with the use of metal removal fluids. Until recently, this voluntary product stewardship has been sufficient to avoid stringent regulatory oversight. However, heightened scrutiny has prompted possible regulatory mandates. Such mandates can only be justified based on sound legal, technical and economic bases.

ILMA summarized its legal concerns about the draft criteria document in its comments to NIOSH, dated May 31, 1996. The Association states:

> ILMA also has legal concerns with the issuance of a criteria document based upon inadequate scientific support. These legal concerns, in part, form the basis for the Association's recommendation that NIOSH publish a hazard review that would not include a [recommended exposure limit] REL.
>
> Section 22(d) of the Occupational Safety and Health Act, 29 U.S.C. § 671, authorizes NIOSH to conduct research "for the development of criteria for new and improved" OSHA standards. Generally, NIOSH recommendations must be formally adopted by OSHA through a rulemaking before they are effective. However, a NIOSH criteria document, and more specifically, a REL, can become the basis of a section 5(a)(1), "general duty clause" violation. 29 U.S.C. § 654(a).
>
> The test for whether a REL may be the basis for a general duty clause violation requires more than general recognition within the industry. Under the case law, OSHA has the burden of demonstrating a general duty clause violation and must prove: (1) a condition or activity in the workplace presents a hazard to an employee; (2) the condition or activity is recognized as a hazard; (3) the hazard is causing or is likely to cause death or serious injury; and (4) a feasible means exists to eliminate or materially reduce the hazard. *National Realty and Construction Co. v. OSHRC*, 489 F.2d 1257 (D.C. Cir. 1973).
>
> Notwithstanding this burden, companies that use metal removal fluids should not be exposed to potential legal liability based upon a REL that is unjustified and lacks scientific foundation.

(ILMA Comments at pp. 10-11) Thus, NIOSH's "guidance," if issued as a criteria document, could be used by OSHA for enforcement purposes and could substitute for a notice-and-comment rulemaking to revise OSHA's current Permissible Exposure Limit for oil mists. NIOSH's role as an advisory group should not determine regulatory compliance and should not substitute for rulemaking and SBREFA activities.

In addition to its legal concerns, ILMA's Health and Safety Task Force has identified to NIOSH numerous technical deficiencies with the draft criteria document. The lack of technical

and scientific justification should undercut the need for stringent regulation of metal removal fluids, yet NIOSH proposes expensive and demanding requirements. If adopted, or merely enforced by OSHA, NIOSH's recommended standard would have debilitating effects on small businesses. For example, NIOSH suggests medical monitoring in addition to stringent worker exposure limits. There is a very high cost associated with medical monitoring that would put an unnecessary burden on all businesses, particularly small and medium-sized companies. NIOSH estimates that there are 1.2 million workers potentially exposed to metal removal fluids. Based on data presented by OSHA, approximately 840,000 workers are exposed to levels greater than 0.3 mg/m^3. For these workers, annual physicals would be required by health care professionals trained in NIOSH's lung spirometry standard. In addition, other medical and surveillance tests not specified by NIOSH, could be incorporated into a medical monitoring program. Further, 588,000 of the 1.2 million workers are employed by companies with less than 100 persons in the shop. This illustrates the potential cost problems for smaller companies.

As a result, ILMA believes that all agencies should be required to follow the spirit of SBREFA, whether drafting formal rulemakings or recommending that other agencies take regulatory action. Not only should NIOSH submit its draft recommendations to Congress for review, it should establish its own mechanisms for informing the Small Business Administration about upcoming health and safety studies and should seek small business input prior to making recommendations to OSHA. Such a procedure will assist OSHA in deciding what actions it should take in response to NIOSH's recommendations. ILMA suggests that the Small Business Committee query NIOSH on SBREFA, especially the statute's interaction with criteria documents.

* * * *

ILMA appreciates this opportunity to submit its comments.

Sincerely,

Jeffrey L. Leiter
Jeffrey S. Longsworth
Counsel to the Independent Lubricant
Manufacturers Association

cc: Keith Cole, Small Business Committee
Anita Drummond, SBA
Health & Safety Task Force
Richard H. Ekfelt, ILMA

**AMERICAN SOCIETY
OF SAFETY ENGINEERS**

1800 East Oakton Street
Des Plaines, Illinois 60018-2187

Judy T. Neel, CAE
Executive Director and Secretary

847 699 2929
FAX 847 296 3769
INTERNET http://www.ASSE.ORG

July 30, 1996

The Honorable Christopher Bond
Chairman, Senate Committee on Small Business
United States Senate
428A Russell Senate Office Building
Washington, DC 20510-6350

STATEMENT ON SBREFA AND REGFLEX

Mr. Chairman,

The American Society of Safety Engineers (ASSE) appreciates the opportunity to present our views on the Small Business Regulatory Enforcement Act (SBREFA), and the Regulatory Flexibility Act (REGFLEX). We read with interest the testimony presented to the Senate Committee for Small Business on July 24, 1996. Our statement will focus on additional areas where the private sector can be of assistance in promulgating regulations which are effective yet efficient, for all levels of U.S. business and the American public.

You had the opportunity to listen to ASSE national testimony on OSHA Reform at a joint Senate hearing of the Small Business Committee and the Labor and Human Resources Committee on December 6, 1995. For this reason, we will forego an introduction, and instead enclose a fact sheet on the Society as an attachment (Attachment #1). We would like to reiterate one fact. Founded in 1911 with more than 32,000 members, ASSE is the world's largest and oldest society of safety professionals. ASSE has committed itself to the protection of people, property, and the environment for eighty-five years. This large membership and significant level of diverse experience enables the Society to provide sound insight on a wide range of safety and health issues.

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To this end ASSE offers the following views:

SMALL BUSINESS ADVOCACY

ASSE supports the protection of U.S. small business interests. Small business represents the fastest growing component of the U.S. economy and many times is the birthplace of innovations. We support small business advocacy programs such as those contained in President Clinton's "OSHA Reinvention Criteria." We believe such an approach balances the interests of both the public, workers, and different levels of U.S. business. However, ASSE believes all Americans are entitled to equal levels of safety and health regardless of the size of their employer. Some of the testimony appeared to indicate small business should be "exempt" from some of this nation's safety, health, and environmental laws. ASSE has concerns with this position due to the fact that small businesses make up the vast majority of employers in the United States. History shows small businesses can benefit financially from some regulatory action. Having all employers comply with a standard ensures an equal level of safety and health for all Americans. The key to success is in the approach. We believe that small business should be approached in a manner which takes into account their access to resources. Exempting small business would be equivalent to maintaining the status quo: there are, unfortunately still large numbers of Americans being injured, killed, and maimed in the workplace on a daily basis. Pollution of our environment is still a reality which we must face. With so much room for improvement, we believe the status-quo cannot be maintained.

OSHA GENERAL DUTY CLAUSE

Mr. Willis Goldsmith testified, at the 7/24/96 hearing, that the General Duty Clause has been invoked in a manner which is not conducive with the provisions of either SBREFA or REGFLEX. Some of our members have also commented that the General Duty Clause is not used in the manner to which it was crafted. While we agree the General Duty Clause should not be used to circumvent the rule promulgation process, we believe use of the General Duty Clause is allowable under some circumstances for the reasons we believe it was originally created and because of the following factors:

•Rapid advancement of technology will leave workers exposed to new hazards until the labyrinth of benefits/assessments analyses is successfully negotiated. Such rapid advancement could not have been foreseen, even in the 1970s.

•Discovery of new hazards cannot be addressed by OSHA since specific regulations must be in existence to address such specific hazards. It would be both a moral and economic disservice to allow workers/public to remain exposed to hazards until the rule promulgation process is complete. It is appropriate to use the General Duty Clause as a "stop-gap" measure until a rule is promulgated.

•The General Duty Clause, a provision in the 1970 OSHAct, is a performance standard which speaks to the national priority for safety and health. Its exclusion removes the focus of the national priority for occupational safety and health.

UTILIZATION OF PRIVATE SECTOR EXPERTISE

Mr. Jere Glover, Small Business Administration Chief Counsel for Advocacy, testified of the outreach taking place to the different trade associations. We commend this effort since inclusion of the private sector makes the regulatory process much more efficient and effective.

We suggest the different professional societies and associations also be included as part of this outreach. Inclusion makes sense since the expertise/resources these organizations offer is significant. ASSE, for example, has a Technical Consultants Division. Many consultants who belong to this division work exclusively with small business interests. Therefore, they have the combination of management and technical skill needed to offer sound insight. On many occasions, trade associations contacted by the Small Business Administration will come to organizations such as ASSE for technical consultation. ASSE can offer solutions which achieve the objectives of a proposed regulation in a much more efficient manner.

A case in point is the implementation of the American Disabilities Act (ADA). Some employers were spending significant amounts of money to make water fountains accessible to the physically challenged. Instead of spending money to rebuild facilities, it was pointed out that a plastic cup dispenser would accomplish the same objective for thousands of dollars less. This small example illustrates why professional societies/associations should be contacted. Organizations such as ASSE offer the expertise which can make regulatory actions more efficient/effective for all levels of U.S. business.

INCREASED UTILIZATION OF PRIVATE SECTOR VOLUNTARY CONSENSUS STANDARD FOR THE CREATION OF REGULATIONS

During our review of testimony, one issue seemed to surface on a consistent basis. This issue is that small business interests are not being heard during the rulemaking process. We suggest many of these concerns could be alleviated through increased utilization of national voluntary consensus standards. The American National Standards Institute (ANSI), is this country's primary national facilitator of voluntary national consensus standards. ASSE is the national Secretariat of five (5) American National Standards, which include:

1.) Z87.1, Occupational Eye and Face Protection
2.) Z117, Entry of Confined Spaces
3.) Z359.1, Requirements for Fall Protection

4.) Z390, Training Requirements for Hydrogen Sulfide Exposure
5.) A1264, Stairways, Floor Openings, and Walking/Working Surfaces

ASSE members also sit on over forty (40) standards development committees and the Society sponsors educational sessions on standards development at our annual Professional Development Conference. Tom Bresnahan, ASSE Director of Technical Services, currently chairs the ANSI Safety and Health Standards Board. ASSE is without doubt one of this country's largest, if not the largest, national developer of consensus standards for occupational safety and health.

These standards must be considered during the rulemaking process because they represent a consensus of all levels of business, employees, and the general public. As we note later in this statement and, more importantly, the Morella Amendment to the recently signed Technology Transfer Act, requires such agency review before rule development. Further, ANSI committees represent a wide range of organizations from small business advocacy groups to the largest corporations in the United States. Standards development committees generally are made up of national organizations representing a wide range of constituents. The standard must also be distributed for general comment before being published, and the operating procedures of ANSI mandate that standards development committees resolve outstanding concerns before final publication.

We suggest such a balance offers the level of participation needed and desired by small business. The mandated balance of the committee ensures one interest cannot control the process. These standards are already recognized in some federal regulations. OSHA recognizes Z87.1 in the Personal Protective Equipment Standard, and Z359.1 was also evaluated during the rulemaking efforts of OSHA's Steel Erection Negotiated Rulemaking Advisory Committee. Probably one of the best examples of the consensus system and potential benefit for small business interests is the recent ANSI conference held on the proposal to create an international safety and health management standard under the auspices of the International Organization for Standardization (ISO). Small business organizations played a key role in the conference, and voiced the position that such a standard was not needed at the present time. In fact, the U.S. Chamber of Commerce had one of the general assembly positions, where Mr. Peter Eide from the Chamber spoke for the protection of small business interests. The U.S. consensus position after much debate appears to be such a standard is not needed at this time, but if ISO decides to pursue such a standard, the U.S. should become actively involved and seek a leadership position. We have also enclosed the copies of the Proceedings from the conference which indicates the balance and consensus building involved with this project (Attachment # 2). Moreover, this is an excellent example of how the consensus system creates an approach which is accepted by and benefits all sides.

ASSE also points out the Technology Transfer Act of 1995 was recently enacted into law. A section of the law mandates that federal regulatory agencies consider national volunteer consensus standards when promulgating regulations. We urge this Committee to investigate additional ways for ensuring the inclusion of these standards in the rulemaking process. Such an approach ensures a balanced approach to standards which results in a consensus acceptable to all parties involved. Such an approach is an effective and efficient alternative to the regulatory rulemaking process.

A case in point is the ongoing revision of ANSI Z87.1 Occupational Eye and Face Protection standard. As Secretariat of the standard, we estimate the entire revision process will take approximately twenty (20) months. This is a considerably shorter timeline than what is usually experienced by federal regulatory agencies. We have also enclosed our position statement on national consensus standards as an attachment for your review, as the paper addresses how the interface between the standards and regulagions can be melded. (Attachment # 3).

We thank you for the opportunity to present our views, and if you have any questions/concerns for ASSE, please feel free to contact me at 804/491-5081 or ASSE's Tom Bresnahan at 847/699-2929, extension 224.

Sincerely,

Nancy J. McWilliams (/NC)

Nancy J. McWilliams, CSP, ARM
President

NJM/TRF/SBREFA

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POSITION STATEMENT ON

THE ROLE OF CONSENSUS STANDARDS IN

OCCUPATIONAL SAFETY AND HEALTH

The utilization of national consensus standards will be of increased importance to this country as the economy of the United States moves towards more of a global perspective. National consensus standards reflect the opinions of the professionals who work at all levels of the public and private sectors in technology development, manufacturing, training, financial analysis, personnel, academia as well as insight from the final end user. This balanced insight enables standards to be crafted in a way which not only benefits and protects users of the standard, but also furthers the interests of the businesses which have been created to meet user demand.

ASSE supports the increased utilization of consensus standards in the formulation of legislation and regulation for occupational safety and health. Governmental agencies such as OSHA, CPSC, NHTSA, etc....should be encouraged to utilize these consensus standards as they prove an efficient/effective alternative to traditional public sector rule making.

POLICY IMPLEMENTATION

ASSE advocates initiatives to encourage the utilization of national consensus standards as an effective/efficient option for meeting the demand of increased regulation/legislation in occupational safety and health since:

- National consensus standards have fewer procedural burdens.
- The consensus method provides for a balance between competing interests.
- The voluntary national of consensus standards enables users to adapt provisions to meet unusual circumstances.
- Much lower standards development costs are obtained.

WHITE PAPER

THE ROLE OF CONSENSUS STANDARDS AND GOVERNMENTAL REGULATIONS IN OCCUPATIONAL SAFETY AND HEALTH

PREFACE

The American Society of Safety Engineers acknowledges a responsibility to take an active role in the evolution of national policy with respect to safety and health standards and regulations. At all times, and especially in times of political reform, there is a need for government to receive the counsel of the safety and health community with respect to standards development and promulgation.

As we review over two (2) decades of social legislation and its enforcement under EPA, OSHA, CPSC, etc., Congress and the professional safety and health community are again raising questions as to what the role of occupational safety and health standards and regulation should be. Some legislators have proposed a more comprehensive program of standards and enforcement. Others have maintained that the proper place for standards development and enforcement is within the national consensus standards-setting framework. Others have supported a performance-oriented approach to safety and health standards.

While this paper primarily focuses upon occupation safety and health standards and regulation, the positions set forth here can be applied generically to other regulatory areas. Essentially the uses of national consensus standards in the regulatory process, unless warranted by legislation already in place, should be pursued along the lines suggested in the various venues of this paper.

INTRODUCTION

To obtain a legislative compromise one of whose objective was to avoid delays that were inevitable if regulations were developed under the provisions of the Administrative Procedure Act, the Occupational Safety and Health Act of 1970 required the newly formed Occupational Safety and Health Administration (OSHA) to promulgate safety and health regulations using existing nationally recognized consensus standards. While this action did serve the congressional intent of quickly establishing a set of regulations for OSHA to enforce, it also resulted in the adoption of hundreds of regulations that were of minimum value in protecting workers. Although OSHA has done much to eliminate such nuisance regulations, enforcement of regulations with questionable value in the 1970's resulted in resentment from industry that lingers even today.

Yet another problem in OSHA's rapid adoption of consensus standards as regulations was that advisory provisions of voluntary consensus standards became mandatory provisions of government regulations. In other words, not only was the voluntary standard made into a mandatory regulation, but many advisory provisions that used the word "should" were made into mandatory provisions when OSHA replaced the word "should" with "shall." The result was that some regulations were, as a practical matter, impossible to fully comply with. Many OSHA regulations were changed to address such concerns, but the experience seems to have damaged OSHA's reputation and credibility.

These developments also impacted the conduct of consensus standards committees. Many committees revised standards to clarify the original intent of provisions, more explicitly addressed exceptions to general provisions, narrowed the scope of the standards or otherwise reacted to developments at OSHA. Even today, members of consensus standards committees look beyond conveying general principles and concepts and concern themselves with exceptions to the rule, adverse impact on specific industries, legal implications of standards, and the potential for misinterpretation. Thus, as a result of OSHA and other factors[1], the development and maintenance of consensus standards related to occupational safety and health has become a much more complicated and demanding endeavor.

Given that OSHA regulations now exist, and given the cost and complexity of developing and maintaining consensus standards, one may question the value of consensus standards activities. Should consensus standards be withdrawn if they cover areas also covered by OSHA regulations? If so, what would happen if OSHA is eliminated? If no, what value is the consensus standard providing? What role should consensus standards play in occupational safety and health? What functions must be reserved for regulation?

To the above end this paper examines the proper role of consensus standards and government regulation in occupational safety and health. After describing the role of consensus standards to occupational safety and health, this paper concludes with a description of policies of the American Society of Safety Engineers intended to enhance this role.

DISCUSSION

The Value of Consensus Standards Generally

When compared to government regulation, consensus standards have several advantages, including the following:

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[1]Notable among these "other factors" are product liability and international trade concerns.

- fewer procedural burdens;
- consensus method;
- voluntary nature allows users to adapt provisions to meet unusual circumstances;
- much lower development cost.

These advantages lead to authoritative documents that can be quickly developed and modified, appeal to common sense, are flexible in application, and are cost effective when compared to the federal regulatory process.

It is important to note that the concept of consensus and the input of most, if not all, materially interested parties is critical to the consensus system. Care must be exercised in the makeup and organization of consensus committees to assure the integrity of the process. Without these attributes the validity of a consensus standard is suspect.

When Government Regulation is Required

As previously stated, the validity of consensus standards is based on achieving consensus among all materially interested parties. It follows that government regulation is probably necessary when consensus cannot be achieved in the voluntary standards process, or when the voluntary standards process does not receive input and consider the views of all materially interested parties.

Government regulation is also required when a higher level of validity or greater objectivity is required for enforcement. Such may be a watershed issue for industry as OSHA is legislatively and administratively reformed. If industry wants high objectivity (i.e. little or no discretion or interpretation by OSHA compliance officers), then detailed and comprehensive regulations must exist. On the other hand, if industry wants less regulation and greater flexibility, then industry should consider greater application of voluntary standards in enforcement decisions made by OSHA compliance officers using their professional judgment. Given the appeal provisions allowed under OSHA this trade off appears worthwhile.

A potential danger in increased use of consensus standards is that the process will become targeted by special interests. However, viewed another way, increased use and application of consensus standards by OSHA will motivate increased participation in the consensus process and thereby increase the quality and validity of consensus standard related to occupational safety and health. While the "political" intensity of the process may increase, each party in the process will proceed with the understanding that (1) consensus does not require unanimity, and (2) failure to reach consensus may result in federal regulation.

The Value of Consensus Standards in Areas Addressed by Government Regulations

A practical concern to resource-limited standards developers is the extent to which support should be continued for consensus standards in areas addressed by government regulation. Consensus standards related to safety and health are perceived as less acceptable when OSHA regulations address the same issue, but nevertheless provide the following benefits:

- consensus standards can provide a useful "how to" supplement to OSHA regulations;
- consensus standards can influence revisions to OSHA regulations;
- unlike OSHA, consensus standards can address off-the-job safety and health issue;
- consensus standards address new issues and incorporate updated scientific information quickly while OSHA proceeds with its rulemaking process;
- consensus standards can provide a valuable reference for safety and health evaluations in cases where OSHA regulations have become outdated.

The Relationship Between OSHA Regulations and Consensus Standards

What the preceding discussion suggests is that a complementary relationship should exist between OSHA regulations and consensus standards. As a matter of policy, OSHA should take advantage of valid consensus standards and use them in enforcement, mindful of the fact that consensus standards are not written to address every foreseeable circumstance. OSHA will spend less money developing regulations, and, armed with common sense, consensus standards, and reasonable discretion, OSHA compliance officers can do their job more effectively. For the consensus standards developer, OSHA regulation can provide an alternative to stalemate when consensus cannot be achieved. In addition, such action is also in accordance with the recently approved (October 26, 1993) Office of Management and Budget Circular A-119 Federal Participation in the Development and Use of Voluntary Standards (See Appendix B). For those almost unresolvable issues of standards setting, the ASSE recommends more use of the negotiated rulemaking option as critical safety and health standards need to be available.

ASSE POLICY IMPLICATIONS

ASSE Supports Consensus Standard Alternatives to Federal Regulation

ASSE encourages support of consensus standards activities and processes as an alternative to government regulation of occupational safety and health whenever conditions permit. When compared to government regulation, consensus standard activities allow for greater participation by ASSE professionals in the development of safety and health practices. Also, since consensus standards do not profess to address every possible situation, ASSE professionals also have greater influence in the application and interpretation of consensus standards than they do with federal regulations.

Implications for OSHA Reform

ASSE encourages support of OSHA reforms that foster the use of consensus standards in enforcement when a standard does not exist, is inadequate, or is obsolete/dated. For safety professionals/practitioners to realize greater opportunities to apply their professional skill and judgement, consensus standards must, in some sense, be authoritative. Without such authority, safety and health professionals may not have sufficient influence and resources to properly do their jobs. For consensus standards to be authoritative. OSHA must be able to routinely rely on provisions of consensus standards in enforcement.

Since national consensus standards do not contemplate every possible scenario, there exists a need for interpretation of the standards based upon professional judgement. When such standards are used in the regulatory enforcement process, federal/state agencies should rely primarily, although not exclusively, upon the view of those who wrote the standards. Facilitation of agency needs should be provided promptly in a collegial manner.

ASSE's View of Government Regulation

While government regulation appears fundamental to safety/health standardization, it should, nevertheless, be efficient, participative, and centralized. The regulated community will more likely view these characteristics as a value added process where they are encouraged to provide input. Having regulations developed centrally reduces the need for each jurisdiction to prepare their own standards. Having multiple standards bodies presents many difficulties for the regulated community that has facilities in many jurisdictions.

Standards need to be written for the regulated community to readily understand and implement. If standards were more clearly written, compliance directives would not be needed as an interpretation would be obvious. Standards often appear written more for ease of enforcement or to help the solicitors prevail in legal proceedings. Enabling legislation may be necessary, in this situation, to achieve the desired results.

These regulatory standards often have some requirements which have little to do with achievement of safety and health objectives. Some of this may result from OSHA's approach in writing standards in a one-size-fits-all style. These standards should require only what is necessary to achieve a reasonable reduction in risk. Layers of documentation and written certifications are often extras that add compliance burden with little safety/health accomplishment. If enabling legislation is needed to obtain these results, such action may be necessary.

Standards, developed by OSHA or any agency, need a user panel review before they are published in final form. Enabling legislation or appropriate regulation may be required to obtain this result.

Standards covering similar issues in the same Part or across different Parts of OSHA standards should have the same requirements, unless the hazards are very different.

OSHA should have an active process to review standards and update them on a five (5) year cycle after a period of experience in application to harmonize them with the more current consensus standards.

The standards making/regulatory process should factor in a requirement to allow visits of sites/personnel in the regulated community at any time in the development of a standard to review how issues proposed or being developed for regulation are currently being managed and the costs of managing these issues.

The above features should be put forth or considered as desirable tasks of rule-making when legislators or regulators move toward development of such regulatory standards.

CONCLUSION

The ASSE supports a complementary relationship between OSHA regulations and consensus standards related to occupational safety and health which uses valid consensus standards enforcement, mindful of the fact that consensus standards are not written to address every foreseeable circumstance. ASSE points out that action of this nature may empower and enhance the professional stature of both ASSE members and OSHA compliance officers. Most importantly, such action will allow for a more efficient and responsive use of occupational safety and health resources thereby improving working conditions.

To further set in place the Society's view of national consensus standards Appendix A is provided. This policy position was approved by the Board of Directors on March 5, 1990. In essence the position looks at consensus voluntary standards apart from regulations while covering the range of issues involved in effective participation in the uniquely American system of standards making.

APPENDIX A

POLICY POSITION
ASSE STANDARDS ACTIVITIES

In fulfillment of the mission and objectives of the American Society of Safety Engineers set forth concerning its role in the arena of technical safety and health standards, these Guiding Principles establish the parameters of such a role accordingly:

- The Society affirms that the voluntary consensus standards system as presently constituted most effectively forms the basis for protecting life, property, and the environment. .

- In support of the consensus standards system the Society will, within the limit of its resources, administrate standards committees to develop safety and health standards, appoint its representatives to other standards committees, and promote the use of these standards.

- Selection of standards committee secretariats shall be by the Board of Directors while appointment of representatives is made according to the Board approved protocol, Selection of Standards Committee Representatives.

- The Society will pursue coordinated efforts with other societies and organizations where such action can facilitate the development of effective safety and health standards.

- The Society supports where feasible performance over specification standards in order to provide flexibility and innovation in complying with the requirements of such standards.

- Society representatives participating on standards committees are empowered to vote based upon their recognized technical expertise and competence. Governing the actions of Society representatives in their service on standards committees is the ASSE Handbook for Standards Committee Representatives. Where the Handbook does not meet all contingencies or unusual procedural and/or substantive problems arise, Society staff shall be contacted to pursue any legal implications with counsel.

- The Society will assure in those standards committees it administrates and participates that due process procedures are regularly reviewed and being observed.

- When appropriate the AVP Research and Standards Development, in conjunction with the Standards Development Committee, will advise the Board of Directors that the direction of the Society's standards activities has legitimate purpose; and it operates with the Society's self-regulation procedures of the voluntary consensus standards system.

- The Standards Development Committee will monitor, and audit, the standards arena in order to recommend policy and procedures for the day-to-day standards operations under the direction of the Director of Technical Services and to implement Board directives upon request.

- In the international standards area the Society should be cognizant of relevant activities which will impact upon domestic, national standards in which the Society operates.

[Additional attachments have been retained in the Committee's files]

Paint Industries Task Force
for
TRUE OZONE POLICY

c/o The Jefferson Group, Inc. 1341 G Street, Ste. 1100, Washington, DC 20005 Fax (202) 626-8578

July 16, 1996

The Honorable Christopher Bond
United States Senate
Washington, DC 20510-2503

Re: Senate Small Business Committee Oversight Hearing-- U. S. EPA's Proposed National Rule for Architectural Coatings

Dear Senator Bond:

We sincerely appreciate that the Senate Small Business Committee plans to hold an oversight hearing to investigate whether EPA has acted properly and complied with the spirit of the newly enacted Small Business Regulatory Enforcement Fairness Act (SBREFA), which was passed by unanimous vote of the Senate and signed into law by the President in March of 1996. This measure amended certain provisions of the Regulatory Flexibility Act to require greater scrutiny of potential economic impacts of EPA regulations on small businesses, effective June 28, 1996. EPA's June 25 publication of a Notice of Proposed Rule making for architectural coatings, despite strenuous objections from numerous small businesses, has raised concerns as to whether EPA intends to prevent our industry from having the benefit of this legislation.

Being manufacturers of architectural coatings, and not having the opportunity to participate extensively in environmental regulatory affairs, it appears strange to us that EPA has been able to successfully ignore the plain meaning and intent of the Reg-Flex provisions. However, this is consistent with our experience with EPA over the last several years, when issues pertaining to small business have been raised in the context of rule development.

The Honorable Christopher Bond
July 16, 1996

As you may know, there are several hundred small business paint manufacturers across the nation, who continue to manufacture viable products for a diverse market. In addition to ourselves, there are thousands of paint dealers, who are also independent small businesses, that rely on our ability to timely and effectively provide quality products. Furthermore, there are thousands of other small business painting contractors who daily purchase our products form either independent dealers or chain stores and who, again, rely on our ability to produce an effective product and deliver it in a timely manner. In essence, small businesses make up not less than 90% of our industry across the nation. Therefore, the need for special consideration of small business concerns is absolutely necessary.

Because of the diversity of our products and because the small business manufacturer often directs his products to certain niche markets, any rule that substantially affects such products will result in real economic harm. EPA's proposed national rule would cause substantial harm, if no other reason because the April 1, 1997, effective date does not allow sufficient time to reformulate products.

Specifically, reformulation will require time and capital, changes in raw materials and, perhaps, changes in the manufacturing process itself. Before the new product is marketed, extensive laboratory and field testing must be accomplished. Unless we are allowed to develop special products to meet the needs and demands of our customers in a proper manner, our companies may be subject to legal actions and claims by the ultimate consumer. This could also affect our product liability insurance policy rates and, perhaps, our ability to carry insurance at all.

Again, we wish to extend our appreciation for your consideration of our needs. The members of our industry will be happy to provide any additional information that your committee and staff may desire.

Very truly yours,

PAINT INDUSTRIES TASK FORCE
for TRUE OZONE POLICY

(Signature endorsements attached)

Signatories:

ALCO-NVC
Mr. Paul E. Smith
Director of Research
Detroit, Michigan

American Coatings Inc.
Mr. Jimmy D. Adams
President
Tomball, Texas

Amsterdam Color Works Inc.
Mr. Stephen Offerman
President
Bronx, New York

Bridges, Smith and Company
Mr. Paul J. Schmidt
President
Louisville, Kentucky

Brod-Dugan Company
Mr. Robert Brod
President
St. Louis, Missouri

M.A. Bruder & Sons, Inc.
Mr. Jim Kelly
Vice President
Philadelphia, Pennsylvania

M.F. Cachat Company
Mr. Michael Cachat
President
Cleveland, Ohio

California Products Corporation
Mr. Ronald B. Child
Vice President
Cambridge, Massachusetts

Cal-Tone Paints, Inc.
Mr. Milton M. Croom
President
Raleigh, North Carolina

Carbit Paint Company
Mr. James Westerman
President
Chicago, Illinois

Century Industries Corporation
Mr. Don R. Brothers
CEO
New Waterford, Ohio

Colorado Paint Company
Mr. Kevin Valis
President
Denver, Colorado

Color Wheel Paint Manufacturing Company
Mr. Donald K. Strube
CEO
Orlando, Florida

Columbia Paint and Coatings
Mr. Hoyt H. Larison
President
Spokane, Washington

Consolidated Color Corporation
Dana Harding
President
Hawaiian Gardens, California

Contract Coatings Corporation
Arlen W. Williams
Vice President and CEO
Stockton, California

Coventry Coatings
Mr. Bruce Z. Sklak
President
Garnerville, New York

Daly's Inc.
Mr. Herbert C. Paulson
Vice President
Seattle, Washington

Dan-Tex Paint Manufacturing Inc.
Mr. T. Leon Everett,
President
Sunnyvale, Texas

Davis-Frost, Inc.
Mr. Calvin C. Henning
President
Minneapolis, Minnesota

DeHart Paint and Varnish Company
Mr. John C. DeHart
President
Louisville, Kentucky

Delta Laboratories, Inc.
Mr. Philip L. Pesola
Executive Vice President
Ocala, Florida

Dunn-Edwards Corporation
Mr. Robert E. Mitchell
Chairman
Los Angeles, California

Dyco Paints, Inc.
Ms. Maxie E. Quinn
President
Clearwater, Florida

Farrell-Calhoun Paint
Mr. J. Anthony Ward
Sales Representative
Memphis, Tennessee

Fine Line Paint Corporation
Mr. Arthur E. Holst
President
Santa Fe Springs, California

Finnaren and Haley
Ms. Regina Haley Pakradoom
President
Conshohocken, Pennsylvania

Gemini Coatings
Mr. John Willard/ Ms. Lisa K. McDonald
Vice President-Operations/ Environmental Manager
El Reno, Oklahoma

Gillespie Coatings, Inc.
Mr. Charles A. Kaplan, Ph.D.
President
Longview, Texas

Hill Brothers Chemical Company
Mr. Dan Gilbert
Managing Chemist
Orange, California

Hoffer's Inc.
Mr. Jerry Fabian
President
Wausau, Wisconsin

Hyklas Paints, Inc.
Mr. John Menefee
President
Louisville, Kentucky

Induron Coatings, Inc.
Mr. David Hood
President
Birmingham, Alabama

Ingels, Inc.
Mr. M.R. Thyer
President
Forresboro, Arkansas

Jennison Industries
Mr. James S. Jennison
President
Burlington, Iowa

Kentucky Paint Manufacturing Company
Mr. Joseph C. Deifel
President
Lexington, Kentucky

Kirker Enterprises, Inc.
Mr Marc Sloven
National Sales Manager
Paterson, New Jersey

A.E. Kohne & Associates
Mr. David E. Kohne
President
St. Louis, Missouri

Kool Seal, Inc.
Mr. Stephen Hudak
President
Twinsburg, Ohio

Kush Paint Company
Mr. Kevin C. Hemenway
President
Roseville, Michigan

Life Paint Company
Mr. Michael S. De La Vega
Vice President
Santa Fe Springs, California

Marepco
Mr. John Hunter
Sales Representative
Arvada, Colorado

Miller Paint Company
Mr. John Buckinger
President
Portland, Oregon

Mobile Paint Manufacturing Company, Inc.
Mr. Robert A. Williams
President
Theodore, Alabama

G. J. Nikolas & Company, Inc.
Mr. J. A. Koch
Executive Vice President
Bellwood, Illinois

OKON, Inc.
Mr. Paul Miller
President
Lakewood, Colorado

Painting Contractors Associates
Mr. Clifford A. Burg
Executive Director
Carmichael, California

Passonno Paints, Inc.
Mr. Richard Cunningham
President
Watervliet, New York

The Perry and Derrick Company
Mr. Mark E. Derrick
President and CEO
Cincinnati, Ohio

Preservo Paint and Coatings Manufacturing
Mr. Robert G. Schneider/ Ms. Pamela Clark
President/ Secretary Treasurer
Houston, Texas

Pro-Mark Group
Mr. Larry M. Ratliff
President
Duarte California

Ranbor Technology, Inc.
Mr. Randall L. C. Russell
Chairman and President
Glenshaw, Pennsylvania

Repcolite Paints, Inc.
Mr. David Altena
President
Holland, Michigan

Rose Talbert Paint Company
Mr. Robert S. Walker
Vice President
Cayce-West Columbia, South Carolina

Rostine Manufacturing and Supply, Inc.
Mr. William A. Rostine
President
Springfield, Missouri

Simpson Coatings Group, Inc.
Mr. Timothy E. Simpson
President
South San Francisco, California

Somay Products, Inc.
Mr. Garth R. Parker
President and CEO
Miami, Florida

Specialty Coatings and Chemistry, Inc.
A. C. MacDonald
CEO
North Hollywood, California

Star Finishing Products, Inc.
Mr. Larry Smith
Vice President
Hinsdale, Illinois

Suntec Paint Inc.
Mr. Joseph H. Anderson
President
Gainesville, Florida

Three-D Distributing
Mr. William L. Austin, Jr.
President
St. Louis, Missouri

T K Products
Mr. Michael P. Stock
Owner
Minnetonka, Minnesota

Triangle Coatings, Inc.
Mr. Ned Kisner
President
San Leandro, California

Trinity Coatings Company
Mr. Richard Williamson
Executive Vice President
Fort Worth, Texas

Wampler Industrial Coatings
Mr. Hersh Zarecor
Vice President/General Manager
Harrisonburg, Virginia

Waterlox Coatings Corporation
Mr. John W. Hawkins
President
Cleveland, Ohio

Wellborn Paint Company
Mr. Bob Cummins
President
Albuquerque, New Mexico

X-I-M Products, Inc.
Mr. Richard Hardy
President
Westlake, Ohio

[Additional attachments have been retained in the Committee's files]

CUNA & Affiliates
A Member of the Credit Union System

Credit Union National Association, Inc.

Suite 300
805 15th Street NW
Washington D C
20005-2207

Telephone
(202) 682-4200

Charles O. Zuver
Executive Vice President
Governmental Affairs Division

August 7, 1996

The Honorable Christopher S. Bond
Chairman
Senate Small Business Committee
428A Russell Building
Washington, DC 20510

Dear Chairman Bond:

The Credit Union National Association is pleased to submit a statement for the record in connection with the Committee's oversight hearings on the implementation of the Small Business Regulatory Enforcement Fairness Act of 1996, P.L. 104-121. By way of background, CUNA is a national trade organization representing the interests of our nation's 12,000 state and federally chartered credit unions through our state league affiliates.

CUNA strongly supports efforts that will reduce the compliance burden on all credit unions without compromising safety and soundness or consumer protections. We are hopeful that Congress will continue to look at ways to relieve the regulatory obligations now placed on credit unions and other financial institutions.

The Small Business Regulatory Enforcement Fairness Act (Act) is an important step in seeking to improve the regulatory process and potentially could benefit thousands of credit unions.

The Act, among other things, requires federal agencies to develop "plain English" compliance manuals on regulatory requirements and answer inquiries from small businesses on compliance issues; directs regulators to consider ways to reduce the impact of new rules on small businesses; provides for judicial review of provisions in the Regulatory Flexibility Act for small entities; and allows regulators, in some circumstances, to waive civil penalties for violations of regulatory requirements. The new law is also designed to make it easier for small entities to recoup attorneys' fees if they are subjected to excessive penalties.

How meaningful these provisions ultimately are to small credit unions and other entities will depend in large part on the efforts of regulators, such as the National Credit Union Administration, to execute the relevant statutory requirements. Because many of the Act's directives only took effect June 28, 1996, much more time will be needed to assess the approach

NCUA and other federal regulators take with respect to the Act. However, based on informal conversations we have had with members of the agency's staff, it appears NCUA takes its responsibilities under the Act very seriously and plans to implement the new requirements as favorably as possible for small credit unions.

Credit unions are subject to regulations from a number of federal agencies, in addition to the National Credit Union Administration. These include the Internal Revenue Service, the Federal Reserve Board, the Federal Trade Commission and others. We are very concerned that these other agencies are also vigilant in complying with the requirements of the new law for small entities, such as small credit unions.

The Act calls for agencies to report to Congress on their implementation efforts. We urge the Committee to plan now to hold another round of oversight hearings this time next year to evaluate the progress regulators have made in making the Act a reality.

Thank you for this opportunity to provide our views on this new law to provide significant regulatory relief for a key sector of our economy.

Sincerely,

Charles O. Zuver
Executive Vice President
and Director of Governmental Affairs

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